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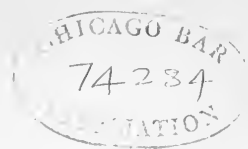
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APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

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46593

PAUL J. QUETSCHKE, going business  
as Paul J. Quetschke & Company,

Appellee,

v.

LEE W. FORD and MABEL FORD,

Appellants.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this action for broker's commission in the sale of real estate by defendants to one Duffy. A trial with a jury resulted in a verdict for plaintiff, upon which judgment was entered. The usual motions for new trial and judgment notwithstanding the verdict were overruled. Defendants appeal from the judgment.

It is not denied that defendants listed the property in question with plaintiff, a real estate broker. Plaintiff advertised the property and interested a number of people. The evidence establishes that plaintiff first contacted and advised Duffy, who later purchased the property. Plaintiff testified that defendants requested him to suspend activity as to the sale of the property for four months, because defendants wanted to enjoy the use of the property during those particular months. Defendants deny that there was such a request made. A letter was received in evidence written by plaintiff to defendants, which defendants denied having received, advising them that Duffy seemed interested in the property and would undoubtedly call to look it over. The defendants ultimately sold the property to Duffy at a price lower than that listed with plaintiff.

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We are satisfied from a review of the evidence that it was a question of fact for the jury whether plaintiff was the procuring cause of the sale. The jury having decided in plaintiff's favor, we should not disturb the verdict unless the verdict is against the manifest weight of the evidence. We think the evidence amply supports the verdict.

Complaint is made of the court's refusal to give instruction No. 17 tendered by defendants. The refusal of this instruction was justified, since the instruction assumed a fact not established by the evidence--namely, that "plaintiff ceased his efforts to sell defendants' property." It also ignored the material fact that plaintiff's efforts were merely suspended for the four months at the request of defendants.

There is no merit in the complaint of the refusal to give other instructions tendered by defendants, because the issues were fully and fairly submitted, and the subject matter of these refused instructions was sufficiently covered by other instructions on behalf of plaintiff and defendants.

Complaint is made that plaintiff's given instruction No. 6 is erroneous, because it is a peremptory instruction, and the jury were told that "if you believe from the evidence in this case," instead of requiring the jury to find from a preponderance of the evidence. Several other objections are made to this instruction. We deem it necessary to discuss only the point raised that this instruction permits the jury to find a verdict for the plaintiff, even if there is only some evidence but not a preponderance of the evidence in

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THE UNIVERSITY OF CHICAGO

1. *Phragmites australis* (Cav.) Trin. ex Steud.

*Ergonomics*, 2016; Vol. 59, No. 7, 825–837

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plaintiff's favor, and that it violates the rule of law that a peremptory instruction must include all of the necessary elements and cannot be aided by other instructions. Except for the names of the parties, the instruction is copied verbatim from Henry v. Stewart, 185 Ill. 448, 452, where it was held the instruction correctly stated the law.

The rule of law referred to by defendants is stated in Hanson v. Trust Company of Chicago, 380 Ill. 194, 197, wherein it is said, "where an instruction directs a verdict for either party or amounts to such a direction, then in such case it must necessarily contain all the facts which will authorize the verdict directed. \* \* \* When a peremptory instruction omits a fact or circumstance essential to recovery, the law is that such error in the instruction cannot be cured by any other instruction in the series of instructions." It is clear to us that the case cited and subsequent cases which follow the rule all refer to the "fact or circumstance essential to recovery." In the Hanson case the essential fact omitted from the instruction "was the exercise of due care for his own safety at the time of the accident," and therefore could not be cured by other instructions.

In Goldberg v. Capitol Freight Lines, 382 Ill. 283, 293, a peremptory instruction was given which outlined the charges of negligence, and that such acts were done "contrary to and in violation of a certain statute of the State of Illinois." The instruction did not include the provisions of or identify the particular statute claimed to be violated.





It was there held that the instruction was sufficiently complete in itself and contained all of the elements to sustain a verdict, and that such an instruction did not contain the vice involved in the instruction in Hanson v. Trust Company, supra.

In Hann v. Brooks, 331 Ill. App. 535, 551, complaint was made of a peremptory instruction which contained the phrase "as charged in the complaint"; that none of the charges in the complaint were contained in the instruction, and therefore was reversible and condemned in Hanson v. Trust Company, supra. The court held that the instruction complained of did not omit a fact or circumstance essential to recovery, as was true of the instruction complained of in the Hanson case, and that the instruction was cured by instructions given on behalf of the defendant. To the same effect is Nordhaus v. Marek, 317 Ill. App. 351.

The instant instruction complained of was cured by defendants' instructions Nos. 14 and 19, which required plaintiff to prove his case by a preponderance of the evidence.

We find no merit in other contentions presented by defendants for a reversal of the judgment. We think the judgment is correct, and accordingly it is affirmed.

AFFIRMED.

LEWE, P.J. AND KILEY, J. CONCUR.

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PORTER D. CAMPBELL,

Appellant,

v.

CONSUMERS SUPPLY COMPANY, a  
corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff filed an action to recover damages for breach of contract resulting from the alleged faulty installation by defendant of a heating plant in plaintiff's building. The court found the issues in favor of defendant and entered judgment accordingly. Plaintiff appeals.

March 1, 1948 the parties signed a written contract which provides in substance that defendant furnish and install a complete heating plant consisting of radiators, steam boiler and stoker "with complete and necessary controls" and that "all labor and material guaranteed to be in good workmanlike manner." Installation of the heating plant was completed in the latter part of March, 1948, and it was used for space heating until the end of April. During the succeeding summer months the plant was used for heating water. Commencing October 1, 1948 until December 28, 1948 the plant was again used for space heating. During the entire period from the time of its installation until December 28, 1948 the heating plant operated continuously. December 28, 1948 the boiler cracked, resulting in the damage here complained of.



The boiler was equipped with an automatic electrical device known as a "low-water cutout," which was attached to a transparent glass gauge. The cutoff consisted of a "float" connected with a mercury switch. When the water in the boiler reached a low point the mercury switch cut off the electrical power, stopping the flow of fuel. In the event the float was obstructed the stoker would continue to operate. The amount of water in the boiler was shown at all times on the glass gauge. Shortly after the installation of the heating plant the operation and function of the low water cutoff and the glass gauge was explained to the plaintiff.

Plaintiff contends that the written contract contained both an express and implied warranty which was breached by the defendant and that there is no substantial evidence in the record to support the findings of the trial court.

It is substantially uncontroverted that the boiler operated efficiently until December 28th. From the time the boiler was installed until it cracked plaintiff had charge of the operation of the heating plant. The law seems well established that the burden of proof is on the person alleging the breach to establish the warranty and the breach of it. See Mayflower Sales Co. v. Frazier, 325 Ill. App. 314.

Aside from the undisputed fact that the boiler cracked there was no proof offered by plaintiff tending to show that the cracking of the boiler was due to any breach of warranty on the part of the defendant. Moreover, defendant's evidence shows that a piece of cardboard had been inserted



into the low-water cutoff, thus preventing it from functioning properly and causing the boiler to become overheated and crack.

Here the heating plant operated continuously and efficiently for almost ten months before the boiler cracked, and testimony of defendant's witnesses, which was not controverted, shows that it was properly installed. Under these circumstances, in the absence of proof by plaintiff showing that the defendant was negligent, plaintiff cannot recover.

From a reading of the record we think the evidence is ample to support the findings of the trial court.

In its statement of defense defendant alleges a settlement in compromise of all plaintiff's alleged claim by acceptance of defendant's check for two hundred dollars. Defendant insists that plaintiff having failed to file a reply admitted the settlement of plaintiff's claim. In the view we take of this case it is unnecessary to consider this contention.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

FEINBERG AND KILEY, JJ. CONCUR.

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O.K. - 13116,  
346A  
Abstract  
Gen. No. 10335

Agenda No. 24

IN THE

FILED

NOV 21 1955

APPELLATE COURT OF ILLINOIS

FOR THE

SECOND DISTRICT

81.A.<sup>2d</sup> 99

JUSTUS L. JOHNSON  
Clerk Appellate Court Second Dist.

OCTOBER TERM, A. D. 1955

CHARLES A. WILLIAMS, JR. and  
IRMA WILLIAMS,

Plaintiffs-Appellees

-vs-

R. E. JOHNSON,

Defendant-Appellant.

Appeal from the  
Circuit Court of  
Winnebago County.

CROW, J.

This is an appeal by the defendant from a judgment of \$383.20, in favor of the plaintiffs. The plaintiffs claimed damages for the cost of repairing a basement wall of their residence in Rockford allegedly injured by the negligence of the defendant while the defendant was engaged in levelling or grading the ground around the outside walls of the basement. The defendant by his answer denied all allegations of negligence, and he also counterclaimed, seeking the cost of installing certain window wells and the value of services for the grading and levelling. The plaintiffs sued for \$575.00 and proved damages of \$475.00. The defendant's counterclaim was for \$91.20, being the cost of the metal areaways or window wells in the sum of \$31.20, and \$60.00 for grading, and installing the metal areaways. The jury found for the plaintiffs and assessed their damages at \$575.00 and also found for the defendant, counter-claimant, and assessed his damages at \$91.20. The Court entered judgments thereon.

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37-10-11

Page 10

Gen. No. 10225

IN THE

APPELLATE COURT OF ILLINOIS

FOR THE

SECOND DISTRICT

FILED

NOV 21 1935

JUSTUS L. JOHNSON

Clerk of the Appellate Court

Dec. 11, 1935

18.1A.99

Appeal from the  
Circuit Court of  
Winnebago County.

CHARLES A. NICHOLS, JR., Plaintiff,  
vs.  
THEY WILLIAMS, Defendant.

Plaintiff vs. Defendant

-vs-

Plaintiff vs. Defendant  
The Court entered judgment in favor of the plaintiff.

Order

This is a report of the facts from a judgment of the Court in favor of the plaintiff. The plaintiff claimed damages for the cost of repairing and leveling the ground around the outside walls of the basement. The defendant while the defendant was engaged in leveling or grading the ground around the outside walls of the basement. The defendant by his answer denied all allegations of negligence, and he also counterclaimed, seeking the cost of installing certain window wells and the value of services for the grading and leveling. The plaintiff sued for \$372.00 and proved damages of \$475.00. The defendant's counterclaim was for \$21.20, being the cost of the metal erections of window wells in the sum of \$21.20, and \$60.00 for grading, and installing the metal erections. The jury found for the plaintiff and assessed their damages at \$372.00 and also found for the defendant, counter-claimant, and assessed his damages at \$21.20. The Court entered judgment in favor of the plaintiff.

Motions were made by the defendant for judgment notwithstanding the verdict and for a new trial, so far as the verdict for the plaintiffs was concerned. Both motions were denied. The Court then entered an order vacating both judgments previously entered, and ordering a remittitur by the plaintiffs of \$100.00, which was done, and then entered judgment for the plaintiffs in the sum of \$575.00, less the remittitur of \$100.00, a judgment in favor of the counterclaimant in the sum of \$91.20, and further ordered the \$91.20 set off against the judgment in favor of the plaintiffs, and a final judgment was then entered in the sum of \$383.20 in favor of the plaintiffs and against the defendant. Evidently the final judgment, as so arrived at, should have been \$383.80, but the plaintiffs are not complaining about that.

The defendant claims, in substance, that (1) the verdict in favor of the plaintiffs is not supported by any legal evidence, is the result of caprice, prejudice, and passion against the defendant, and is against the manifest weight of the evidence; (2) the verdict in favor of the counterclaimant was supported by the evidence and should have been allowed to stand; (3) the Court erred in giving plaintiffs' instructions numbers 2, 4, and 9; and (4) the Court erred in setting off a contract verdict (on the counterclaim) against a tort verdict (on the complaint) in entering up the final judgment.

The witnesses for the plaintiffs were both of the plaintiffs themselves, David J. Gartsen, a mason contractor, the defendant (under Section 60 of the Civil Practice Act), and Eugene Williams, brother of the plaintiff Mr. Williams; the witnesses for the defendant were the defendant himself, and Dele Wilson, his helper on this job. A review of the evidence indicates that the defendant was engaged in the excavating business, and he and his helper were experienced. The plaintiffs were building a new house,



had completed the basement, and had been living in the same since October 1953. They employed the defendant in April, 1954, to install certain window wells and to level off and grade the surrounding dirt which had been removed by the excavation of the basement. The levelling and grading would require, among other things, moving dirt, 3 rather large piles, - or at least a part of such dirt, - to a grade or level point about 20 inches higher around the basement walls than the previous level. The piles were 13 to 16 feet away from the house. The defendant worked with an 8 Ton End Loader. On the day in question, in June, 1954, about 4:45 p.m., while the defendant was still so engaged, Mrs. Williams, one of the plaintiffs, noticed for the first time that the north basement wall on the inside was bowed inward some 2½ inches, that a cement block therein was split, and that there were cracks at ground level around the other three walls, - the bowed place in the wall and the split cement block being just above the old ground level. The defendant's helper inspected the premises shortly thereafter and, in substance, said the wall looked mighty bad, and he also observed certain cracks, though not exactly of the same nature and extent as those described by the plaintiffs. The defendant and his helper both said they observed a cracking in the north wall and water in the basement before they started work, stated that the grader did not strike the basement wall, and that the closest they ever came to the wall with the grader was 3½ feet. The plaintiff Mr. Williams said the north wall was "straight plumb" before the day in question; he had no knowledge of what caused the bowing of the wall, the cracks, or the breaking of the cement block, but said the conditions were not there before and could only have been caused by some heavy blow, and it seems to be substantially admitted that some kind of heavy blow struck against the wall from the outside was the cause of the damage. Mrs. Williams testified positively that the cracks in the walls and the

had completed the basement and had been living in the new place  
October 1933. They occupied the basement in April, 1934, to in-  
stead of the window well was a level and grade was removed  
the dirt which had been removed by the excavation of the basement.  
The leveling and grading would require, among other things, re-  
ing dirt, a rather large pile, - or at least a yard or two.  
dirt, - so a grade or level about 50 inches higher around  
the basement walls than the outside level. The dirt was in the  
to foot away from the house. The dirt was removed about 1934  
and located. On the day in question, it was, I think, about 4:45  
p.m., when the defendant was still in the house, and William, one  
of the parties, noticed the dirt pile in the yard. The dirt  
was still on the ground, and it was about 1934, I think, when  
several black boxes were seen, and the dirt pile was removed  
ground level about the same time, and the dirt pile was in  
the well and the dirt pile was removed from the yard.  
ground level. The dirt pile was about 1934, I think, when  
it was noticed that the dirt pile was removed from the yard.  
and he also covered certain cracks, I think, at the end of the  
some time and some of the dirt pile was removed from the yard.  
defendant and his father were seen in the yard, and the dirt pile  
the north wall and about 1934, I think, when the dirt pile was  
eared that the cracks did not require the basement at all, and the  
the dirt pile, ever came in the well with the dirt pile was 1934  
feet. The plaintiff Mr. Williams said the north wall was "straight  
him" before the day in question; he has no knowledge of what  
caused the bowing of the wall, the cracks, on the bowing of the  
moment block, but said the conditions were not there before and  
could only have been caused by some heavy blow, and it seems to be  
substantially admitted that some kind of heavy blow struck against  
the wall from the outside was the cause of the damage. The

split in the cement block were not there in the morning when the work was begun by the defendant. Some 3 or 4 days after the levelling and grading had been done the defendant again looked at the basement walls, with Mr. Williams, and saw several cracks, though again not exactly of the same nature and extent as are described by the plaintiffs.

Other than the defendant and his helper there apparently were no actual eye witnesses to the defendant's acts. Evidently the grading job was completed by the end of the day. Prior to this case the defendant had not submitted a statement to the plaintiffs for services in the grading and levelling operation. The plaintiff Mr. Williams and his brother had constructed the basement and walls during the summer of 1953, the subflooring had been put in the last of September, 1953, the back filling of dirt around the walls had been done by them, by hand shovel, up to the old ground level about November, 1953, and the place so stood until the spring of 1954. Up until the fall of 1953 the basement was exposed and some water occasionally got in there, which would evaporate, before the subflooring was installed and the dirt back filling done. No water got in after that.

If the plaintiff can recover, it must be on the theory that the evidence, direct and circumstantial, could reasonably lead to an inference that the defendant by his acts caused the injured condition of the basement walls. The only persons working about the house that day were the defendant and his helper. The defendant admittedly moved the dirt around by his machine to some extent, but stated that he did not push the dirt in a direction towards the basement walls, - always moving parallel thereto, - and, as indicated above, he said he did not come closer than  $3\frac{1}{2}$  feet to the walls with the machine. On the other hand, the plaintiffs argue, among other things, that it is unreasonable to believe that, in the time available, the helper could, by hand, shovel the dirt a width of  $3\frac{1}{2}$  to 4 feet around the basement walls to a new grade or levelling height some 20 inches higher than be-

[illegible]



fore, and they point out that the circumference of the house was about 88 feet, and the quantity of dirt that had to be so moved and graded up to the walls (by their mathematical computation) was about 600 cubic feet, which, they calculate, is equivalent to a pile about 10 feet long, 10 feet wide, and 6 feet high.

We believe those were all proper circumstances for the parties to present and argue to the jury and for the jury to consider, together with all the other facts and circumstances proven at the trial, in arriving at their verdict, and in doing so they could properly draw reasonable inferences from facts proven by direct or circumstantial evidence, if they found they were so proven. The plaintiffs' case here does not necessarily depend entirely on so called circumstantial evidence, but if it did a verdict may well be founded on such evidence alone; such is not necessarily inferior to or outweighed by so called direct evidence; it is always for the jury to determine, where there is a conflict in the evidence, what evidence, - be it circumstantial, or direct, or both, - is entitled to the greatest credit: SLACK v. HAN IS (1902) 200 Ill. 96.

As to the defendant's motion for judgment notwithstanding the verdict, so far as the verdict for the plaintiffs is concerned, under the Civil Practice Act and Supreme Court Rule 22, (CH. 110 ILL. REV. STATS., 1953, par. 259.22):

"The power of the Court to enter judgment notwithstanding the verdict may be exercised in all cases where, under the evidence in the case, it would have been the duty of the Court to direct a verdict without submitting the case to the jury."

A motion by a defendant for a directed verdict and a motion by a defendant for judgment notwithstanding the verdict present a question of law as to whether, when all the evidence is considered, together with all reasonable inferences and intendments from it in its aspect most favorable to the plaintiff, and if con-



sidered as true, there is a total failure or lack of evidence to prove any necessary element of the plaintiff's case; on such a motion if there is any competent evidence which, standing alone, fairly tends to prove the essential elements or allegations, the motion must be denied; on such a motion the Court is not concerned with the weight or credibility of the evidence; reasonable inferences may be drawn by a jury from established facts; a verdict of a jury may not be set aside merely because the jury might have drawn different inferences or merely because a judge may possibly feel that other inferences or conclusions than the one drawn might be more reasonable: HEIDEMAN v. KELSEY etc. et al., (1953) 414 Ill. 453; CITY OF MONTICELLO v. LE CRONE et al., (1953) 414 Ill. 550; LINDROTH v. WALGREEN CO. et al., (1950) 407 Ill. 121; MORLO etc. et al. v. PUBLIC SERVICE CO. et al., (1943) 381 Ill. 300; RUNT v. VERMILION COUNTY CHILDREN'S HOME et al., (1942) 381 Ill. 29; and whenever facts are in dispute, or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture from the evidence is necessarily required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be, under the evidence, the most reasonable inference, and it is only when there is a complete absence of probative facts to support the conclusion and inference reached that reversible error in overruling a motion for judgment notwithstanding the verdict may appear: LINDROTH v. WALGREEN CO. et al., *supra*; LAVENDER v. KERN (1946) 347 U. S. 645, 90 L. Ed. 916. We cannot say here there was a complete absence of probative facts, direct or circumstantial, to support the inference and conclusion reached by the jury in its verdict for the plaintiffs, and, hence, there was no error in denying the defendant's motion for judgment notwithstanding the verdict.

As to the defendant's motion for a new trial, the court may on such a motion weigh the evidence, not to determine, as an

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original matter, its preponderance, which is the jury's function, but only for the purpose of determining whether the jury's verdict is contrary to the manifest weight of the evidence; if the Court so finds it is, then a new trial should be granted; if it does not, a motion for new trial should be denied, so far as that ground is concerned; and, similarly, if this Court finds, upon such weighing of the evidence in that light, that the verdict is contrary to the manifest weight of the evidence we will hold the trial court erred in not allowing a motion for new trial, if that was its action; but if we do not so find then the trial court's action in not allowing a motion for new trial is not error, so far as that ground is concerned; the Court may not set aside a verdict on a motion for new trial merely because the evidence is conflicting; nor can we assume the function of a jury and substitute our judgment for that of the jury in passing on the weight and credibility of conflicting testimony: HELFMAN v. HELSKY etc. et al., supra; CITY OF MONTICELLO v. LE CRONE et al., supra. Here, all things considered, we cannot say the jury's verdict for the plaintiffs is contrary to the manifest weight of the evidence, and, accordingly, there was no error in denying the defendant's motion for a new trial so far as that ground is concerned.

There was sufficient evidence, direct and circumstantial, for the case to go to the jury. It is the province of that body, primarily, to settle and determine disputed questions of fact and determine the weight of the evidence and the credibility of the witnesses. If it were not so, there would be little use for the jury system, - PEOPLE v. HANSEN (1935) 361 Ill. 465. The jury and the Trial Judge were in a better position, having observed the conduct and demeanor of the witnesses, to determine their credibility and the truth of this controversy, as to the disputed facts, than are we. The general rule is that negligence is a question of fact for the jury, and as long as a question remains

[illegible]

whether a party has performed his legal duty or has observed that degree of care and caution imposed upon him by law, and the determination of the question involves the weighing and consideration of evidence, the question must be submitted as one of fact: PETRO v. HINES (1921) 299 Ill. 236. Even where the facts are admitted or undisputed but where a difference of opinion as to the inference that may legitimately be drawn from them exists, the question of negligence ought to be submitted to the jury, - it is primarily for the jury to draw the inference: DENNY v. GOLDBLATT BROS. I.C. (1939) 298 Ill. App. 325.

With respect to the defendant's second point, it is our understanding that the verdict for the defendant-counterclaimant on his counterclaim of \$91.20 was allowed to stand, was not set aside, a judgment for such was entered, and, by virtue of that judgment being set off and credited against the plaintiff's larger judgment in entering up the net final judgment for the plaintiffs, the defendant-counterclaimant's judgment for \$91.20 has thereby been paid and satisfied in full. The defendant cannot properly complain on that score.

With respect to the defendant's third point, the plaintiffs' given instructions numbers 2, 4, and 9 were:

Instruction No. 2

The Court instructs you that it is not necessary for the plaintiffs to prove by direct and positive evidence alone that the defendant was negligent, but this may also be proved by circumstantial evidence, that is by proof of such facts and circumstances as give rise to a reasonable inference that defendant was negligent, if the facts and circumstances are sufficient to raise such inference.

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whether a party has performed his legal duty or has observed that

degree of care and attention required upon him by law, and the de-

termination of the question involves the weighing and consideration

of evidence, the question must be answered as one of fact. 200

Y. 1132 (1901) 220 117, 220. When there are facts and evidence or

undisputed but where a difference of opinion as to the inference

that may legitimately be drawn from them exists, the question of

negligence must be left to the jury. 200 117, 220. When the facts

for the jury to draw the inference of negligence are undisputed

(1902) 220 117, 220. 200.

This passage in the defendant's second point, it is con-

sidered that the error of law was a technical one, and

as the defendant is at 200 117, 220, it is not to be

held, a judgment of law was entered, and, in fact, of law.

Judgment was entered in favor of the defendant, and the

judgment is affirmed as the defendant is at 200 117, 220.

It is also affirmed as the defendant is at 200 117, 220.

been held and affirmed as the defendant is at 200 117, 220.

affirmed on the facts.

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Judgment was entered in favor of the defendant, and the

judgment is affirmed as the defendant is at 200 117, 220.

It is also affirmed as the defendant is at 200 117, 220.

been held and affirmed as the defendant is at 200 117, 220.

affirmed on the facts.



Instruction No. 4

The degree of proof required of the plaintiffs in this case is that they prove their respective allegations by a preponderance of the evidence. This means that upon the questions of fact which the plaintiffs are required to prove they must have a greater weight or preponderance of the evidence, but this rule does not require the plaintiffs to prove any facts beyond a reasonable doubt; a fact is sufficiently proved if the jury find that the greater weight of the evidence is in its favor.

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Instruction No. 9

The Court instructs the jury that if you believe from a preponderance of the evidence that the defendant's equipment was negligently operated and as a direct and proximate result, the plaintiffs' building was damaged, it is your duty to assess such damages as you may believe from the evidence the plaintiffs are entitled to.

You are instructed that the measure of damages, in such case, is the ordinary and usual cost, in the area in which such building is situated, of restoring said building to its ordinary and usual value immediately prior to and at the time the building was injured, as shown by the evidence, which the plaintiffs sustained directly and proximately from such injury, if any.

As to Instruction No. 2, the defendant says that it is an instruction ordinarily given where the plaintiff relies on the doctrine of res ipsa loquitur and unless the plaintiffs rely on res ipsa loquitur, - which the plaintiffs say they do not, - the instruction is not competent. We perceive nothing wrong in principle with the instruction, nor do we understand that such type of instruction is necessarily limited ordinarily to res ipsa loquitur cases, and analogous forms of instructions, when applicable to the case, have been previously given and approved: HEMPHILL, ILL. JURY INSTRUCTIONS, Vol. 1, p. 558 - 566. And we do not consider the defendant's only cases cited on this, - WENDEMACHER v. CHOATE (1922) 224 Ill. App. 42, and NEVER v. STAGGS (1932) 264 Ill. App. 556 as having any bearing at all on the case at bar.

The degree of proof required of the plaintiff in this case is that they prove their respective allegations by a preponderance of the evidence. This means that the facts of the case which the plaintiff are required to prove they must have a greater weight or preponderance of the evidence, but this does not require the plaintiff to prove any facts beyond a reasonable doubt. It is sufficient proof if the jury is satisfied that the weight of the evidence is in their favor.

The law requires that the jury in this case find a preponderance of the evidence in favor of the plaintiff's allegations. The plaintiff has the burden of proof, and the defendant has the right to cross-examine the plaintiff's witnesses and to present evidence in their own defense. The jury must weigh the evidence and determine if the plaintiff has met their burden of proof by a preponderance of the evidence.

For the reasons stated, the jury is instructed that in such cases, it is their duty to find in favor of the party who has the greater weight of the evidence. The jury must consider all the evidence presented to them, and they must not be influenced by any arguments or statements made by the attorneys. The jury's decision must be based on the facts and the law.

As so instructed, the jury is to find in

an instruction accordingly. It was found that the

doctrine of res ipsa loquitur is applicable in this case.

The law requires that the jury find in favor of the

plaintiff in this case, as the evidence clearly shows.

It is the duty of the jury to find in favor of the

plaintiff in this case, as the evidence clearly shows.

It is the duty of the jury to find in favor of the

plaintiff in this case, as the evidence clearly shows.

It is the duty of the jury to find in favor of the

plaintiff in this case, as the evidence clearly shows.

It is the duty of the jury to find in favor of the

plaintiff in this case, as the evidence clearly shows.

As to Instruction No. 4, the defendant says it minimizes the duty of the plaintiffs as to their proof by stating "but this rule does not require the plaintiffs to prove any facts beyond a reasonable doubt". Again, we see nothing erroneous in principle with the instruction, and similar instructions have been many times given and approved: HEMPHILL, ILL. JURY INSTRUCTIONS, Vol. 1, p. 284-285. Although extended efforts by instructions to define "preponderance of the evidence" are not to be particularly encouraged, - as being more likely in most cases to confuse than help the jury, - the instruction here is short, simple, not inaccurate, and we do not believe the jury would have been misled thereby. The defendant cites us no cases holding such to be an improper instruction.

As to Instruction No. 9, the defendant says it has entirely to do with negligence and is not based on any evidence because the plaintiffs did not maintain their burden of proof of negligence. Again, we perceive no error in principle in the instruction. So far as it may have to do with negligence it is based on the evidence, for the reasons heretofore stated in discussing the defendant's first point on the appeal and his motions for judgment notwithstanding the verdict and for a new trial. Beyond that, we conceive that the instruction does not have entirely to do with negligence, but is evidently more of an instruction on the measure of damages, as to which the plaintiffs were entitled to an instruction, and as to that it appears accurate: HEMPHILL, ILL. JURY INSTRUCTIONS, Vol. 1, p. 490. The only case the defendant cites on this is ROSENKRANS v. BARKER (1885) 115 Ill. 331 and we do not believe it is in point here, under the circumstances.

[illegible]

With respect to the defendant's fourth point, there was no error in setting off, or recouping, or crediting a contract verdict and judgment (on the counterclaim) for \$91.20 against a tort verdict and judgment (on the complaint) for \$475.00 in entering up the net final judgment for the plaintiffs for \$383.20.

Section 38 of the Civil Practice Act (CH. 110 ILL. REV. STATS., 1953, par. 162) provides, in part, so far as material:

"(1) Subject to rules, any demand by one or more defendants against one or more plaintiffs, or against one or more co-defendants, whether in the nature of setoff, recoupment, cross-bill in equity or otherwise, and, whether in tort or contract, for liquidated or unliquidated damages, or for other relief, may be pleaded as a cross-demand in any action, and when so pleaded shall be called a counterclaim."

And Section 50 thereof (CH. 110 ILL. REV. STATS., 1953, par. 174) provides, in part, so far as material:

"(1) Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and the court may \* \* \* grant to the defendant any affirmative relief to which he may be entitled on his pleadings and proofs; and when an action or counterclaim is sustained in favor of, or against, only a part of the parties thereto, judgment may be rendered in favor of or against such parties respectively at any stage of the proceedings. \* \* \* \* \*. The court shall control the proceedings so that the plaintiff shall receive but one satisfaction. \* \* \* \* \*. Judgment may be entered in such form as may be required by the nature of the case and by the recovery or relief awarded, and more than one judgment may be rendered in the same cause.

"(3) In case a counterclaim is filed, the judgment shall be so drawn as to protect the interests of both parties, and subject to rules, no execution shall be issued until all the issues in the case have been determined by the judgment, except by leave of court."

Section 38 as to counterclaims is broad and is designed to extend the filing of counterclaims to include subjects which may not necessarily have been previously permitted by set off, recoupment, or cross bill; the plaintiff's demand and the defendant's



counterclaim need not necessarily be of the same character; they may be, respectively, legal, or equitable, or both; they may be respectively, in tort, or contract; they may be, respectively, for liquidated, or unliquidated damages, or other relief:

PEOPLE ex rel. v. CIRCUIT COURT etc. et al. (1946) 393 Ill. 520.

The extension of the right to file counterclaims of such wide variety necessitated some change in the entering of judgments or decrees; this was done by Section 50 and, particularly, subparagraph (3) thereof, which disregards the distinctions that previously existed as to cross bills, set off, and recoupment, and which had formerly been carried into the entry of judgments when such cross demands had been filed, - the statute now providing that judgments on counterclaims shall be entered "as to protect the interests of both parties": PEOPLE ex rel. v. CIRCUIT COURT etc. et al. supra.

A judgment for a defendant-counterclaimant on a counterclaim sounding in tort may be set off against a decree for the plaintiff in an action sounding in contract and the judgment on the counterclaim may be decreed to be so satisfied by such set off: STATE BANK etc. v. GUNN et al. (1939) 295 Ill. App. 15. Even at common law, upon the principle of recoupment, not set off, a claim originating in contract may be set up against one founded in tort, and vice versa, if the counterclaim arises out of the same subject matter and is susceptible of adjustment, by recoupment, in one action, the counterclaim being in mitigation of damages by way of reducing the amount of the plaintiff's recovery: SEE BTER v. STREETER (1867) 43 Ill. 155; WILLIAMS v. SCHMIDT (1870) 54 Ill. 205; WATKINSON v. CLARK et al. (1875) 76 Ill. 428.

There can be no question but that under Section 38 the defendant's counterclaim, sounding in contract, was properly pleaded, so far as this matter is concerned, as a counterclaim against the plaintiff's complaint, sounding in tort, - this particular counterclaim, arising out of the same subject matter as the





complaint and being susceptible of adjustment in the same action would have been proper, upon the principle of recoupment, even at common law. If proper as a matter of pleading, then necessarily the judgment, - which is simply the conclusion of the court on the pleadings and evidence, - offsetting or recouping the counterclaim against the complaint must be correct. The judgment, we believe, within the meaning of Section 50, grants to the defendant the affirmative relief to which he is entitled on his pleadings and proofs, it is entered in such form as the nature of the case and the recovery or relief awarded requires, and it is so drawn as to protect the interests of all parties.

The judgment, accordingly, is affirmed.

Dove, R. J. concurs      APPROVED.  
Eovaldi, J. - Concurs



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ALICE VAN STRATEN, HENRY VAN STRATEN, ALBERT PADY, PETER PLEND and IDA DICKENSHEETS, individually, in their own behalf and for others similarly situated and doing business as Bethany Publishing House, an unincorporated association,

Appellants,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY, a banking corporation; THE FIRST NATIONAL BANK OF CHICAGO, a banking corporation; THE NORTHERN TRUST COMPANY, a banking corporation; CONTINENTAL ILLINOIS SAFE DEPOSIT COMPANY, a corporation; THOMAS D. NASH, Public Administrator of Cook County, Illinois, and Administrator of the Estate of Mary S. Clayton, deceased; BERTHA CUNY; PAUL CUNY; MARVIN WALTON; EARL WALTON, JR.; CARROLL WALTON; GLADYS WALTON DYER, and unknown heirs at law of Mary S. Clayton, deceased,

Appellees.

8 I.A.<sup>2d</sup> 100

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior Court of Cook County striking the third amended complaint and dismissing the cause of action of the plaintiffs therein. This complaint was the fourth to be stricken by the trial court.

The dispute is in regard to certain funds which were in the possession of Mary S. Clayton at the time of her death. Certain defendants claim the funds as her heirs at law, and others claim the funds by way of gift causa mortis from her. The administrator of the estate and certain banks and a safe deposit company in whose possession the funds were also



were made parties defendant. The banks and the safe deposit company filed answers and counterclaims interpleading the two groups of defendants who were contenders for the fund. When the court dismissed the cause of action of the plaintiffs the case was continued on the counterclaim of certain defendants as interpleaders as to certain other defendants.

The theory on which the plaintiffs appeal, as stated in their brief, is that the members of a religious voluntary association had set up in 1911 an unincorporated association known as Bethany Publishing House and that said members and contributors to Bethany now constitute the membership of Bethany; that Mary S. Clayton, deceased, had conducted the affairs of Bethany and that she received continual and numerous contributions for its religious work, which money she deposited in her own name; that the plaintiffs are bringing the action as individual contributing members of the religious faith and as members of the faith who were authorized to conduct the business of Bethany and in a representative capacity; that plaintiffs claim a constructive trust upon all the funds which were in the possession of Mary S. Clayton at the time of her death, which funds they claim belong to all of the individual members and contributors of Bethany.

In the third amended complaint, which was filed by Alice Van Straten and four others, individually, in their own behalf and in a representative capacity, it was alleged that there was in existence a Christian religious organization founded prior to 1911, organized in the first instance

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generally as assemblies and known as "Full Gospel Assembly", which organization is a voluntary association of individuals and assemblies, and that at the present time there are existing many such assemblies, "groups and individuals" in the United States and in foreign countries; that in 1911 Bethany Publishing House was established as a voluntary association by members and assemblies of the faith, and the funds and affairs of Bethany were and are owned by and are under the control of the members of the religious organization; that the funds and property were dedicated to the propagation of such faith; that Bethany was organized to and did distribute religious information and pamphlets to members of the religious organization; that various persons in succession conducted the affairs of Bethany, and each successor succeeded to its duties, funds and assets with the consent and approval of the members and assemblies of the faith.

The complaint also alleges that Wallace R. Clayton, husband of Mary S. Clayton, was a minister of a Chicago assembly of the faith, and about 1942 he and Mary S. Clayton took over the affairs of Bethany with the consent and approval of the members of Bethany association, including the plaintiffs herein, and disseminated information to the members of the faith and assemblies and received free will offerings from them; that during this period Wallace R. Clayton was paid \$60 a month by the Bethel Full Gospel Assembly of Chicago (of which assembly he was presumably the minister, though it is not so stated in the complaint); that after his death in 1947

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he was succeeded by Mary S. Clayton, his widow, who took over the affairs, monies and assets of Bethany "with the full approval and consent of its members who had contributed to it, and the Assemblies thereof", and the Bethel Full Gospel Assembly paid her \$50 a month thereafter as its contribution to her in her work for the faith and in the management and control of Bethany; that during her lifetime she was active in the religious affairs of the faith in addition to her conduct of the affairs of Bethany; that no solicitation for contributions or gifts was made by Bethany but it was made known to "its various members and followers that said Bethany Publishing House would accept what was termed 'free will offerings' from members of said Faith and from the Assemblies thereof."

It is further alleged that during the lifetime of Wallace R. and Mary S. Clayton there were large sums of money contributed as free will offerings by members of the faith for use in the religious work "in the promulgation, maintenance and practice of said faith" and it is charged on information and belief that Mary S. Clayton, on Wallace R. Clayton's death, received funds from such contributions "to her husband and herself in the conduct of the affairs" of Bethany in excess of \$15,000, which funds rightfully belong to the association. It is alleged that after the death of Wallace R. Clayton there were sent to Mary S. Clayton "continuous innumerable contributions or free will offerings from the members and Assemblies of said faith, some in the name of Bethany Publishing House

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and some in the name of Mary S. Clayton, but all of which were so intended for such religious work by the donors and contributors thereof and with that understanding"; that Mary S. Clayton acknowledged receipt thereof by numerous letters which indicate in effect that "such amounts were so received and were for use in said religious work and for the benefit of said association"; that the plaintiffs themselves have contributed in the aggregate large funds to her (though no statement<sup>is</sup> made in the complaint as to the amount of such funds); that the plaintiffs have definite knowledge of a contribution of \$2,000 at one time from one person; and it is charged on information and belief that the contributions aggregated an average in excess of \$6,000 a year over and above any expenses in the conduct of the affairs of Bethany and that much of the material, work and service in connection with Bethany was furnished without charge by various members of the faith; that outside of the foregoing Mary S. Clayton had no other source or income from which money could have been received by her and that all of the money in the banks and safe deposit box in the name of Mary S. Clayton are proceeds of and from the contributions received by her from "said members and Assemblies."

It is further alleged that Mary S. Clayton died November 28, 1952; that shortly after her death inquiry was made by the plaintiffs and others concerning the affairs and funds of Bethany, and particularly inquiry was made of the defendants Bertha and Paul Cuny (who claim the funds by gift causa mortis); that no information could be obtained, nor



was any mention made of any funds on hand or that Bertha and Paul Cuny claimed any of such funds, and that only recently has it been learned that the deceased had on hand large sums of money and funds aggregating \$31,876.34, which rightfully belong to "the association of individuals and Assemblies which conducted their said affairs under the name of the said Bethany Publishing House"; that after the death of Mary S. Clayton an administrator was appointed; that proof of heirship was made in the Probate Court of Cook County (the administrator and the heirs being made parties defendant herein); that no inventory has been filed by the administrator, who is the public administrator of Cook County, nor has he taken possession of any of the funds or monies.

It is further alleged that the heirs at law make claim to the said funds; that Bertha Cuny and Paul Cuny, who were members of the sect, claim such funds as gifts causa mortis, and it is alleged that no such gift was made them because there was no actual completed delivery and possession of the funds or money, and that the funds or money belong to Bethany and were held for the conduct of such religious faith and the dissemination of information and news; that any such supposed gift on the part of Mary S. Clayton was solely for the purpose of an attempt to continue the work of Bethany; that at the time when the gifts were alleged to have been made Mrs. Clayton was 87 years of age, in failing health and in an extremely senile condition, mentally incompetent to make such gift.

The complaint alleges that "by lawful authority of the various Assemblies and members of said faith, the affairs of

the first of the two main parts of the work, the first part is devoted to a general survey of the history of the world, from the beginning of time to the present day. The second part is devoted to a detailed account of the history of the world, from the beginning of time to the present day. The first part is devoted to a general survey of the history of the world, from the beginning of time to the present day. The second part is devoted to a detailed account of the history of the world, from the beginning of time to the present day.

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Bethany Publishing House have been turned over to the plaintiffs" and further states that the plaintiffs have accepted the same and declare that they will use the funds in the conduct of Bethany in the religious matters and faith of the assemblies and members thereof.

The prayer for relief asks that a decree be entered "1. That the defendants Bertha Cuny and Paul Cuny, also known as Leopold Cuny, have no right, title or interest in and to said bank accounts, moneys or property belonging to Mary S. Clayton, deceased, during her lifetime and that they account to the plaintiffs for all funds received by them as such free will offerings and to turn over and pay the same to plaintiffs for the use and benefit of Bethany Publishing House and the members of such faith and Assemblies thereof"; "2. That all the money in the hands of the respective defendant banks in said accounts and in said safe deposit box belongs to and is the property of the plaintiffs and others similarly situated for said Bethany Publishing House, or in the alternative to the designated individual plaintiffs doing business as Bethany Publishing House, and for the benefit of the members of the Assemblies and faith, and that such amounts be delivered to plaintiffs for the foregoing purpose"; that neither the defendant heirs nor the administrator has any interest in said funds; that the plaintiffs, for themselves and others similarly situated, offer to "take, receive, hold and administer said funds in the manner and for the purposes intended by the various persons contributing the same and in accordance with

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[illegible]



the requirements and terms set forth in the decree."

In different paragraphs of the third amended complaint it is alleged that the individual plaintiffs are members of and contributors to the funds of Bethany; that the funds contributed to Bethany rightfully belong to it; that the said funds were owned and were under the control of the members of the religious organization consisting of members and assemblies of the faith; that various persons succeeded to the funds and assets of Bethany and that among them were Wallace and Mary Clayton, both deceased; that the funds were owned by the Bethany Publishing House and the faith assemblies and organization through which Bethany conducted its affairs; that the free will offerings were contributed to Bethany Publishing House or Mary S. Clayton during the time she operated the same; that large sums were contributed to Wallace R. Clayton and Mary S. Clayton during their lifetime and that after the death of Wallace R. Clayton, Mary S. Clayton succeeded to and received funds from such contributions to her husband and herself to the extent of \$15,000. In paragraph one of the prayer for relief it is stated that the funds belonged to Mary S. Clayton during her lifetime, and in paragraph two of the prayer for relief it is stated that the fund is the property of the plaintiffs and others similarly situated for the Bethany Publishing House. These various allegations are contradictory and some of them must be false.

The law applicable to a situation where the ownership of the funds at issue is in the religious organization and



where it is in Mary S. Clayton or Bethany Publishing House is vastly different. If the funds were owned by Bethany Publishing House or by Mary S. Clayton during her lifetime, there might have been an express trust. If the funds were owned by members of the faith, then whatever relationship existed between them and Bethany Publishing House or Mary S. Clayton would not have been a trust relationship.

The plaintiffs state in their brief that they seek to impose a constructive trust on the funds, which they state belong to all of the individual members of Bethany. Reading the complaint it is impossible to determine upon what theory of law the plaintiffs are proceeding. It is equally impossible to determine upon what fact they rely.

The rule in equity which requires all persons materially interested in the subject or object of the suit, however numerous, to be made parties applies to voluntary associations. While a voluntary association cannot sue in the name of the association, suit may be brought by all the members, and in case the members are too numerous to make that practical, the action may be brought in the names of a portion of the members<sup>suing</sup> for themselves and in behalf of all the other members, or in the name of a committee of persons regularly appointed by the organization (Whitney v. Mayo, 15 Ill. 251; Gulfoil v. Arthur, 158 Ill. 600); but the complainants must show an actual existing interest in the subject matter of the suit (Central Cotton, etc., Ass'n v. International, etc., Union, 280 Ill. App. 168); and the pleadings must show the right and interest of the



plaintiffs in the subject matter of the suit, and where plaintiffs contend that they are suing in a representative capacity, the facts showing their right to do so should be pleaded (Southerland v. Copeland, 350 Ill. App. 313), so that they may be bound by any decree which the court may enter.

The three complaints previously filed were in substance the same as the complaint before us. The complaint is in one count and the allegations are not in the alternative, though the prayer for relief is. "The purpose of pleadings is to present, define, and narrow the issues, and to form the foundation of, and to limit, the proof to be submitted on the trial. They are designed to advise the court and the adverse party of the issues and what is relied on as a cause of action or a defense, in order that the court may declare the law and that the adverse party may be prepared on the trial to meet the issues raised. Pleadings are intended to serve as a means of arriving at fair and just settlements of controversies between litigants, and they should not raise barriers which prevent the achievement of that end. The object of pleading is not to defeat but to advance the ends of justice \* \* \*." 71 C.J.S. Pleading sec. 1.

In the complaint before us it is alleged that the individual plaintiffs "are conducting the business of Bethany Publishing House, an unincorporated association; are members thereof; and are also contributors to the funds of Bethany Publishing House \* \* \*. There are many other persons, groups



and Assemblies, hereinafter more fully set forth, who made similar contributions to said Bethany Publishing House or Mary S. Clayton during the time she operated said Bethany Publishing House and who are members of said association and whose positions are similar to that of the plaintiffs in this regard and are so numerous that it would not be feasible to join them as parties plaintiff, but who have in innumerable instances authorized the plaintiffs to bring this action in their behalf and to take over and represent their interests as members of said association in the conduct of the business of the Bethany Publishing House." It is also alleged that Bethany was established in 1911 as an unincorporated association by members and assemblies of the faith; that the "funds and affairs of Bethany Publishing House were and are owned by and under the control of the members of said religious organization"; that the persons who in succession conducted the affairs of Bethany succeeded to its duties, funds and assets "with the consent and approval of the members and Assemblies of said faith."

From the pleading we cannot tell who the parties are in whose behalf the representative suit is brought, and the plaintiffs seem to labor under the same difficulty. In their brief they state that they are bringing the "action as individual members of the Faith who contributed free will offerings to the fund and also as the members of the Faith who are authorized to continue and are continuing the work and conducting the business of the Bethany Publishing House, an





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unincorporated association." They also state that the "members of the Faith and contributors constitute an unincorporated association known as Bethany Publishing House." Again, "plaintiffs in their representative capacity and as individual members of the unincorporated association claim a constructive trust of the funds to be used for the work of said Faith carried on in the name of Bethany Publishing House which belongs to all of the individual members thereof and contributors thereto." Again, "the funds and affairs were and are owned by and under the control of the members of said religious organization." Again, in the reply brief, "it is the ordinary class suit brought by certain members of the unincorporated association in their own behalf and in the behalf of others similarly situated doing business as Bethany Publishing House. The plaintiffs do not bring it as trustees or as the designated individuals to carry on the work of the Bethany Publishing House." And again, "it is stated that there are persons, groups and assemblies who are members of the association, and, in fact, in the opening paragraph it is clearly stated that the plaintiffs and others similarly situated doing business as Bethany Publishing House, an unincorporated association, bring the action."

The entire complaint creates a fog of doubt and uncertainty both as to ownership and devolution of the funds and as to the parties for whose benefit the suit is brought. The prayer for relief further roils the already muddy



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waters. In paragraph one the plaintiffs ask that the Cunys account for and turn over to the plaintiffs all funds received by them as free will offerings. Nowhere in the complaint is there any allegation that any free will offerings were made to the Cunys. In paragraph two the prayer is that the monies be decreed to be the property of the plaintiffs and others similarly situated for Bethany, or in the alternative to "the designated individual plaintiffs doing business as Bethany Publishing House."

While it is undoubtedly true that a trust fund may be traced into whoever's hands it may come, in order to trace a trust fund a trust must first be shown. In the complaint allegations are made that there were contributions made by members and assemblies of the faith to the Bethany Publishing House or to Mary S. Clayton. The fact that it is alleged that these funds were intended to be used for a specific purpose would not be sufficient to make the donees trustees. Bogert, Trusts and Trustees, vol. 1, sec. 46. The only attempt to show that the funds in question are the same funds which were so contributed is the allegation made on information and belief that Mary S. Clayton had no other source of income from which monies could have been received by her and that all of the funds in the name of Mary S. Clayton are proceeds from the contributions received by her from the members and assemblies. The \$60 a month paid to Mr. Clayton during his lifetime and the \$50 a month paid after his death to Mrs. Clayton were not sufficient for their support. It is commonly



known that contributions made to ministers or persons engaged in religious work do not admit a strict line of demarcation between money for their support and maintenance and money which is to be specifically expended on behalf of the religious organization. The allegations in the complaint with reference to the intentions of the donors do not make such a distinction. A motion to strike a complaint admits all material allegations of fact well pleaded. Conclusions of the pleader are not admitted. The statements as to the sources of Mary S. Clayton's income and that the funds are proceeds from the contributions are mere conclusions without any allegation of fact to support them. Further, the only statement as to how the plaintiffs acquired any right to administer the affairs and funds of Bethany is not shown, except by the statement that it was done "by lawful authority of the various Assemblies and members of said faith."

Neither the plaintiffs nor the defendants have raised any question as to whether or not the trust sought to be imposed would be a charitable trust; nor, if it were so, whether suit could be brought by anyone other than the attorney general of the State. While these questions are not before us, because of such latent possibility it becomes even more essential that the pleadings should be definite and certain.

The complaint before us is so indefinite, uncertain, confused and contradictory that it does not state a cause of action. The order of the Superior Court of Cook County is sustained.

Affirmed.

Robson and Schwartz, JJ., concur.



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GILBERT KITT, Appellee,

v.

LIBERTY NATIONAL BANK OF  
CHICAGO, as Trustee under  
Trust No. 5712, CARL H. BORAK  
and STANDARD SECURITIES &  
MANAGEMENT CORPORATION,  
Appellants.

8 I.A.<sup>2d</sup> 101

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendants for the recovery of excess rents under the Housing and Rent Act of 1947, as amended, and pursuant to a contract between the parties relating to the payment of such rent. A jury was waived and the issues were presented to the court. The court entered a judgment for \$1257 from which defendants appeal.

On August 14, 1951, plaintiff leased the premises in question for a period of two years from September 1, 1951 at a monthly rental of \$360. On August 30, 1951 the ceiling rental for the premises under the Housing and Rent Act was \$330 per month. On February 20, 1952, plaintiff having learned of the ceiling price, through his attorney wrote to defendant Borak, as agent of the building, stating that his client had learned for the first time that the maximum rent on the apartment was \$330 per month; that he understood the landlord had petitioned for an increase in the maximum rent and that the petition was then pending; that as an indication of plaintiff's good faith (evidently referring to his contractual obligation) he would continue





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to pay the monthly rental of \$360 until an order was entered on the pending petition and that when the order was so entered, a proper adjustment was to be made concerning the rent theretofore paid. A reply to this letter dated February 21, 1952, signed Standard Securities & Management Corporation, by Borak, President, stated that while the petition for an increase in rent was pending, they had decided to set aside the \$30 difference per month between the registration rental and the lease arrangement and to hold such amount in a separate fund until such time as the new rental registration was approved and that "such new registration will be retro-active, and, when and if it comes through, we will then, at that time, give the building credit for such accumulated amount as is set aside each month covering said difference." On May 22, 1952, the Rent Director, instead of granting the petition for an increase in rental, issued a further order reciting various errors in the proceeding which led to the previous order and determining the rent for the apartment to be \$313.80 per month effective August 23, 1951. During that period defendants had on file with the Office of Rent Stabilization a petition seeking an increase in the ceiling rent to \$400 per month because of substantial improvements and additions. Before any action was taken on that petition federal rent control expired and no determination of the petition was made.

The complaint filed January 28, 1954, rested on two grounds: (1) That defendants had unlawfully demanded and



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received payment of rent in excess of the maximum rent prescribed under the provisions of the Housing and Rent Act in the amount of \$30 monthly for the first seven months of 1953, or a total of \$210, for which plaintiff prayed treble damages; and (2) that pursuant to an agreement (as evidenced by the letters in question) plaintiff was entitled to a return of \$690, being the accumulated difference between maximum legal rent and the rent paid by plaintiff for the period between September 1, 1951 and July 31, 1953. The trial court after hearing the case found that plaintiff was entitled to damages as follows:

\$30 per month, being the difference between \$330 and \$360, for 23 months, pursuant to the contract, or	\$ 690.00
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\$16.20 per month, being the difference be- tween \$313.80 and \$330, for 17 months, or	275.40
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Treble damages for 6 months for the difference between \$313.80 and \$330, or	<u>291.60</u>
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making the total damages so recoverable -	\$1257.00.
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Thereupon plaintiff amended the first count of his complaint and averred that the maximum ceiling rental had been fixed at \$313.80 per month from August 23, 1951, and that defendants had retained excess payments in the sum of \$46.20 per month for 6 months of 1953. He amended count II and averred he was unaware that the maximum legal rent was \$313.80 and that it was for that reason he had agreed to pay \$360 per month; that defendants agreed that the excess would be set aside pending the outcome of the petition and that an adjustment would be



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made depending upon how much of an increase would be granted; that the Act expired July 31, 1953, without any action being taken on the petition for an increase; that under the terms of the agreement plaintiff was entitled to the return of \$1062.60, being the accumulated difference between the maximum legal rent and the rental paid by him.

Defendants claim that the court erred in the computation of damages in three respects: (1) that no recovery should have been allowed for the 17 months overcharge which occurred more than one year prior to the filing of plaintiff's suit because under the terms of the Act the right to recovery was limited to overcharges made within one year after the date of violation; (2) that no assessment of treble damages should have been made because the pleadings admit and the evidence shows that defendants acted in good faith. It is further argued that certain evidence was improperly excluded and that the agreement as evidenced by the letters did not require defendants to make refund to plaintiff "under the conditions which developed,"

With respect to plaintiff's count seeking a recovery under the Housing and Rent Act there can be no question that plaintiff is limited to a period of one year prior to the filing of the suit. As the Act expired on July 31, 1953, this was six months. Any other remedy would have to be based on the agreement evidenced by the letters. This agreement relates to the \$30 difference between \$330 and \$360 per month. It is defendants' contention that one of the condi-



tions for the return of the \$30 per month is that there should be a determination under the Housing and Rent Act of the petition filed by defendants for an increase. However, we do not so construe the correspondence.

The relationship between the parties appears to have been friendly if not, indeed, cordial. Plaintiff appeared willing to pay the rental of \$360 monthly provided that was the legal rent. Defendants also appear to have accepted that interpretation. Thus, defendant Standard Securities & Management Corporation, agent for the building, stated in its letter of February 21, 1952, that it would hold the difference of \$30 per month and "if and when the new registration is established, it will then give the building credit for such accumulated amount as is set aside." The change never having become effective, the agent, in a sense a custodian for both parties, was required to return to plaintiff the funds so held by it pursuant to the agreement. Noll Co. v. Sparks Milling Co., 304 Ill. App. 624, 631, 632, is cited in support of defendants' position. There, a contract covered the purchase of flour, a commodity subject to the Agricultural Adjustment Act and to processing taxes levied thereunder. There was no separate billing of the price of the commodity and the tax imposed, but it was contended by the plaintiff that the price included the processing tax. After the contract had been performed the act in question was held invalid, the tax declared unconstitutional, and the seller of the commodity thereby had as part of its





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profits money included in the purchase price for payment of the tax. The defendant argued, and the court so held, that since the tax was not earmarked and the contingency was not provided for in the contract, its happening could not give the plaintiff a claim to those funds. That situation is different from the case at bar. In the instant case defendant Standard Securities & Management Corporation stated specifically that it would hold the excess payments of \$30 per month and would credit the building with them only "when and if it [the order for increased rental] comes through."

Under these circumstances Standard Securities & Management Corporation has no right to give the money to the landlord. To whom, then, does the money belong? Clearly, to the one who paid it--that is, the plaintiff. It is our conclusion, therefore, that the trial court correctly held that plaintiff is entitled under the agreement to \$30 per month for 23 months, or \$690.

With respect to the excess rental not provided for, that is, the difference between \$313.80 and \$330 per month, plaintiff can only recover under the Housing and Rent Act and since that is limited to violations occurring within a period of one year prior to commencement of suit, which was filed January 28, 1954, he can only recover on this for the period from January 28, 1953 to the expiration of the act, July 31, 1953. The court trebled those damages, making that item \$291,60. However, he also allowed the



excess of \$16.20 per month for the period of an additional 17 months, although that was barred by the statute of limitations. Plaintiff presents no adequate explanation of this item. He argues, however, that the judgment is not excessive because the court could have adopted another theory which would have made the total damages more than that which the court allowed and therefore it cannot be said that the judgment was excessive. We cannot concur in this position. The soundness of the suggestion made by plaintiff is by no means convincing but even so, the issue was not made in the trial court. The inclusion of \$275.40 for a period of 17 months barred by the statute of limitations was erroneous.

The question next arises whether the trial court was correct in trebling the difference between \$313.80 and \$330 for the last six month period. This, defendants contend, can only be done if the defendants are shown not to have acted in good faith. They contend first that the good faith of the defendants was admitted under the pleadings. This contention is based on the proposition that their answer having alleged good faith and no reply having been filed thereto, no issue was made thereon and good faith is thereby admitted. It appears clear that in the course of the trial it was considered that good faith was an issue. Defendants put on some evidence to establish good faith and there was some additional evidence offered to prove it which the court deemed irrelevant. This waived the necessity for a

I have been thinking of you very much lately, and wondering how you are getting on. I hope you are well and happy. I have been very busy lately, but I have managed to find some time to write to you. I have been thinking of you very much lately, and wondering how you are getting on. I hope you are well and happy. I have been very busy lately, but I have managed to find some time to write to you.

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reply. Cienki v. Rusnak, 398 Ill. 77, 89; Sottiaux v. Bean, 408 Ill. 25, 28, 29; Magnusen v. Klemp, 339 Ill. App. 179. Defendants further contend that they proved good faith. It is clear that defendants proved there was a friendly relationship between the parties but they also established that they knew that rent was being collected in excess of the ceiling rental. Under the Housing and Rent Act it was not enough that parties act in good faith toward each other. The Act authorized the recovery of treble damages if the violation was wilful or the result of failure to take practicable precaution against the occurrence of the violation. It was obviously a heavy burden placed upon landlords to see to it that in spite of overtures by tenants to the contrary, no rental would be fixed in excess of that provided by the Act. We think it clear, therefore, that under such circumstances the court could properly impose treble damages.

It is argued that the court improperly rejected an offer to prove that work in the amount of \$14,000 had been done on the premises, that conversations had been held with the Chief Rent Examiner in the Office of Rent Stabilization with respect to the petition for increase which had been filed, and that on each occasion patience was urged, and other similar matters. All this goes to a general equity which is not sufficient under the Housing and Rent Act to hold that the action of the trial court was erroneous in awarding treble damages.

It is our conclusion that the judgment of the court was correct with respect to the item of \$690 and with respect



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to the item of \$291.60, making a total of \$981.60, but that it was in error with respect to the item of \$275.40. Judgment in the sum of \$981.60 will be affirmed upon the filing of a remittitur by plaintiff in the sum of \$275.40 not later than fifteen days from the date of the filing of this order. Otherwise the judgment will be reversed and the cause remanded with directions to the trial court to enter judgment for \$981.60.

Judgment affirmed upon plaintiff's  
filing remittitur in the sum of  
\$275.40 within fifteen days.

McCormick, P. J., and Robson, J., concur.

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No. 10869

Agenda No. 13

FILED

DEC 1 - 1955

In The

APPELLATE COURT OF ILLINOIS

Second District

JUSTUS L. JOHNSON October Term, A. D. 1955.

Clerk Appellate Court Second Dist.

CHRIS DE CARLO,

Plaintiff-Appellee,

vs.

FLORENCE DE CARLO,

Defendant-Appellant.

8 I.A. 1-8

APPEAL FROM THE  
CIRCUIT COURT OF  
WINNEBAGO COUNTY.

No. 10891

Agenda No. 13

CHRIS DE CARLO,

Plaintiff-Appellant,

vs.

FLORENCE DE CARLO,

Defendant-Appellee.

APPEAL FROM THE  
CIRCUIT COURT OF  
WINNEBAGO COUNTY.

NOVALLI -- J.

Separate appeals have been taken:- by defendant, from the decree of the trial court finding her guilty of extreme and repeated cruelty and desertion and awarding plaintiff a divorce and dismissing her counterclaim for separate maintenance; and, by plaintiff, from the order of the lower court subsequently entered directing plaintiff to pay to the defendant the sum of \$35.00 per week as temporary alimony pending her appeal from said divorce decree.

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THE JOURNAL OF THE  
ROYAL ANTHROPOLOGICAL INSTITUTE

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The Journal of the Royal Anthropological Institute, Volume 42, Part 1, 1912, contains the following articles:  
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9. The Journal of the Royal Anthropological Institute, Volume 42, Part 1, 1912, contains the following articles:  
10. The Journal of the Royal Anthropological Institute, Volume 42, Part 1, 1912, contains the following articles:

On appeal to this Court, the two cases have been consolidated since there are common questions of fact and law.

The amended complaint of the husband filed September 30, 1954, alleged that the parties were married on September 4, 1921, and lived together up to the 2nd day of May, 1953, from which time they lived separate and apart without fault on his part; that the plaintiff at all times during the marriage conducted himself as a true, just, kind and affectionate husband; and that the children of the parties were of full age, married and established in homes of their own. The amended complaint charged that the defendant had been guilty of extreme and repeated cruelty toward the plaintiff, setting up the dates of the alleged acts of cruelty; and further charged the defendant with being guilty of wilful desertion.

To the original complaint defendant filed answer on June 5, 1954, which answer was ordered by the court on September 30, 1954, to stand on motion of defendant as the answer to the amended complaint. In said answer defendant admitted the marriage and admitted the raising of the family, but denied the charges in the amended complaint. She alleged in her answer that the plaintiff left their home, about the last part of April, 1953, leaving a note stating that he was leaving; that she had at no time given him any reason for leaving their home and that the reason that plaintiff left was because of another woman; that she continued to reside in her home and that she requested him to return and live in his home, which he refused and failed to do; "That as evidence of her good faith in this respect, she herein again requests the plaintiff to return and live in his home as her husband." The answer further charged that since the summer of 1952 plaintiff had not conducted himself as a husband should.

The cause came on for hearing on November 30, 1954, on the

On appeal to this Court, the two cases have been consolidated.

Since there are common questions of fact and law,

The answers and issues of the two cases are the same.

1934, alleged that the parties were married on November 1, 1934,

and lived together as man and wife until the day of the divorce.

that they lived separately and apart because of the fact that

that the plaintiff at all times during the marriage was

himself as a woman, and that the defendant was a man.

the children of the marriage were born to the defendant

lived in the same household as the plaintiff and the defendant

that the defendant was a man and the plaintiff was a woman.

exactly contrary to the facts as stated in the complaint.

alleged that on November 1, 1934, the parties were married

being duly and lawfully joined.

To the extent that the complaint is correct in

1934, which alleged that the parties were married on

1934, to stand a chance of being married on November 1, 1934,

alleged that the parties were married on November 1, 1934,

marriage and that the parties were married on November 1, 1934,

changes in the parties' names and that the parties were

that the plaintiff was a woman and the defendant was a man.

April, 1935, received a divorce decree from the court.

she had as her first husband, and that she was a woman.

and that she was a woman and the defendant was a man.

woman; that she continued to live in the same household

requested him to return and live in his home, and that she

and failed to do so; that she was a woman and the defendant

request, she herein again requests the court to grant

and live in his home as her husband. The proper remedy

charged that since the summer of 1935 plaintiff had not

conducted himself as a husband should.

The cause came on for hearing on November 30, 1935, on the

amended complaint and answer thereto, at which time evidence was heard. The cause was continued for preparation of briefs. On December 22, 1954, the cause came on for further hearing, and arguments of counsel were heard and the cause was continued for further hearing.

On January 14, 1955, leave was given defendant to file counterclaim for separate maintenance, and same was filed on said date; the counterclaim setting up that the parties had accumulated and owned jointly a considerable amount of real and personal property; that plaintiff was able-bodied and self-employed in the operation of a garage, from which he received a substantial net income and counter-plaintiff was a housewife and unemployed and had no gainful occupation, and in addition thereto, had been under medical treatment and doctor's care for several years. The counter-plaintiff further charged that on or about the 29th of April, 1953, the counter-defendant, without any reasonable cause, left the home of the parties and since that time the parties had lived separate and apart; that counter-plaintiff had orally, and in writing, requested the counter-defendant to return and live with her as her husband, but he had at all times refused to return; "that counter-plaintiff herein again requests the counter-defendant to return and live with her as her husband in their home, and she makes this offer without any condition whatsoever, it being her firm belief that this marriage which has existed for 33 years should not terminate." On January 21, 1955, the court granted counter-defendant leave to file answer to the counterclaim and the same was thereupon filed by plaintiff, counter-defendant. Thereafter, on January 26, 1955, defendant filed a motion for rehearing in the cause which said motion on February 11, 1955, was denied by the court and decree for divorce was entered by the court on February 14, 1955.



On February 23, 1955, defendant and counter-plaintiff filed a motion to vacate the decree and for a rehearing, which said motions were by the court denied on March 3, 1955. Defendant, counter-plaintiff, appeals from said decree and orders.

It appears from the evidence that the defendant, about 52 years old, swears and uses dirty and foul language, and that she flies into fits of rage and has a violent temper; and, that she has ridiculed and abused the plaintiff, making fun of his eating habits and his clothes.

Plaintiff, 58 years of age, weighing over one eighty-five pounds, sets up one of the dates of extreme and repeated cruelty as August 12, 1953. His version of the affair is that the defendant raised a hammer in a threatening manner toward him and that her son restrained her. Defendant's version is that she picked up the hammer but she was nowhere near plaintiff and did not intend to use the hammer.

Plaintiff states that on said August 12, 1953, the defendant pounded him about the shoulder and kicked him as he was going out of the office. Defendant's version of this occurrence was that it had always been her habit or custom to go to the garage to use the phone; that she used to sell gas, make out statements, make out his checks and all that kind of work and would stay out in the garage and help him; that she never struck or hit him on August 12, nor did she strike him with her fists; and that on the occasion in question he took hold of both of her arms and that they were made black and blue; that on this occasion he also shoved her. That on one occasion she did raise her foot, but she never kicked him; that when she went to the garage, he would scream and yell at her.

Plaintiff gave another occasion, December 6, 1953, when he testified defendant pushed him in the mouth and against the wall and held up an adding machine in a threatening manner. Defendant

[illegible]



denied that she struck or hit him about the mouth or face on this occasion; that her son also worked at the garage and she went there sometimes twice a week, and that on some occasions there was an argument and on other occasions nothing was said. He testified that plaintiff screamed and hollered at her and that the incident about the glasses was that Mr. De Carlo slapped himself so hard he knocked his glasses off.

Another occasion mentioned by plaintiff was on January 15, 1954, when he states she hauled off and struck him a violent blow on the jaw. Defendant's version of the latter occurrence is that, on the day before, she had seen plaintiff with "this woman" and her boy; that he had picked them up on North Main Street and said he was going to take them home; that he was all dressed up and that they (plaintiff, the other woman and the boy) were going out then somewhere and he was mad about it; that the next morning, after 7:00 o'clock, his car was in the drive at the garage and she (defendant) went over to talk to him, and his car door was open and she sat on the edge of the seat and he grabbed her by both arms and pushed her against the car horn and wouldn't let go and "that is when the horn got stuck". He denied striking him on that occasion.

Joe Inglima testified that he was a mechanic employed by plaintiff for about ten years, and that on August 12, 1953, when he was working, there was a big argument in the office and that defendant hit and kicked plaintiff on the way out and that she was angry. He admitted on cross-examination that he heard conversations between plaintiff and defendant in which some other woman was mentioned; that this matter came up quite often.

The above is the evidence of the plaintiff with reference to the acts of cruelty.

As to the charge of desertion, Henry Anderson who had been employed by plaintiff for 26 or 27 years testified that he



was with plaintiff one time when plaintiff tried to get in the house "for the painter or whatever it was", and she told him that "he wasn't getting in or that he couldn't get in now or something ; that she wouldn't let him in.

The aforesaid witness, Joe Inglima, testified that he was over to plaintiff's house after May, 1953, when plaintiff went to get in the house and defendant wouldn't let him in.

Plaintiff testified that on March 28, 1953, he came home about 12:30 or 1:00 o'clock in the morning; that he tried to unlock the basement door but it wouldn't unlock "so I banged on the door a little bit and I could tell that there was a long bolt that we put in this basement door when we wanted to lock it from the inside and that long bolt was there. so, I knocked on the door and nobody answered and I couldn't open it, so I went to a hotel for the night." He testified that he went home the next day.

On April 29, 1953, he testified that he went to Chicago for a couple of days to visit friends and that on May 2 or 3 after visiting friends he returned home and tried to unlock the door but it was locked. That he again knocked on the door, and then went to the hotel and stayed there; that he couldn't get in the next day to get his clothes. That he went back on many occasions, but couldn't get in.

In support of her case, defendant testified that as to plaintiff's testimony with reference to the occasion about the end of April, and the beginning of May, 1953, she went home and found a note which was addressed to her and signed by plaintiff; that she had gone to the garage and plaintiff wasn't there, and that on the evening of April 29 the note was left at the home; that was on a Wednesday; and plaintiff did not return until Friday morning. That the back door was open and Mr. Anderson was in the cellar taking care of the furnace, and

"The woman's getting as or more so confident as I was in my relationship  
with her husband's job in  
house "for the balance of whatever it was", and she told him that  
was with pleasure one time when Kinkaid tried to get in the

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OFFICE OF THE ATTORNEY GENERAL, AND IS NOT TO BE  
DISCLOSED TO THE PUBLIC.

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Mr. Anderson was in the collar taking care of the horses, and returned until Friday morning. That the back door was open and at the house; that we saw a man, a woman, and a child in the porch, and that on the evening of April 30 the man was left there; that she had gone to the garage and probably would have found a note which was addressed to her and which by letter said of April, and the beginning of May, 1935, that she had been in the apartment with reference to the fact that it was the apartment of her name, and that it was the apartment of her name, and that it was the apartment of her name.

plaintiff came home and asked for his shoes because he had been taking his clothes out of the house gradually; that his shoes were out in the car and that she got them and gave them to him and he went down to the cellar and got his jacket and whatever else he had in the cellar; that he left that evening and did not return home. The note which plaintiff left with defendant was as follows: "Florence, now don't get any idea in your head, I am going out of town a day or two and I am not going with anyone but my lonesome self. If you don't fight me, I am going to take care of the lawn, the porch and the stoker and if you fight me, be sure and think it over good before you be sorry too. You will be taken care of if you be good. And don't blame anyone else. I will see you later. Chris."

She testified that the trouble between her and the plaintiff was all the while on account of that woman; that whenever she would talk to him about that woman he would just scream. "What this woman has done to him I don't know." That there had been lipstick on his shirt and coat, but it was in 1952 that she saw them together for the first time. The lipstick was earlier than that. She related many incidents extending over a period of months wherein she had observed plaintiff and the other woman together; he would leave on Friday night and would not come home until in the morning, and change his clothes and go to work; that she had seen plaintiff bring groceries to the other woman's house and had seen where he had bought them; that he bought ice cream and other stuff and went there with it and that since April of 1953 he told her that it was his hard-earned money, and that he could spend it on who he wanted to and no one was going to tell him, and that it was none of her business.

One witness testified for defendant under subpoena, Harold Debris, Jr. He stated that he had known plaintiff for about a year; that he had met him at his mother's house; that

plaintiff came home and asked for his shoes because he had been taking his clothes out of the house gradually; that his shoes were out in the car and that she took them and gave them to him and he went down to the cellar and got his shoes and whatever else he had in the cellar; that he left them overnight and did not return home. The note which plaintiff left with defendant was as follows: "Reference, now don't let your idea in your head, I am going out of town a day or two and I will be with anyone but my conscience will be with me. I am going to take care of the car, the car, and the house and if you think of it come and think it over good before you be sorry too. You will be sorry later of it and I will be sorry too. I don't blame anyone else. I will be sorry later." The defendant said she had seen the car in the garage and it was all the while in the garage; that she had seen the car and she would talk to him about it and she would not say anything. That this woman had come to him and said to him, "I have been living on the third and fourth, and I have been living with them together for the first time, the first time was earlier than that." The defendant said many things, extending over a period of months, which she had observed, testified and she other woman together; he would leave on the night and would not come home until in the morning, and change his clothes and go to work; that she had seen plaintiff's car, registered to the other woman's house and had seen where he had bought (that) that he bought ice cream and other things and she said that it and that since early of 1933 he told her that it was his and earned money, and that he could stand it on the ground that and no one was going to tell him, and that it was none of her business.

The witness testified for defendant under subpoena. Harold Roberts, Jr. He stated that he had known plaintiff for about a year; that he had met him at his mother's house; that

plaintiff visited there once or twice a week during the past year; ate meals there and that he guessed that plaintiff and his mother went out places together. He stated that he never went with them. He testified that the last time he saw plaintiff at his mother's house was on the Sunday before testifying; that when plaintiff came to his mother's house he would bring groceries with him; that his mother and father were divorced; and that he saw plaintiff and his mother together at Lake Delavan, Wisconsin, on one occasion when he was with a bunch of "kids", and they passed them.

When plaintiff was cross-examined, he admitted that he had taken a lady and a boy home from the show shortly before January 15, 1954; he admitted having been over to this other woman's house one, two, three times a week for the past 2 years; that he had taken her to a show and that he had taken her to Wisconsin; that he had taken her groceries; and in answer to a question by defendant's counsel: "Q. She is in her late thirties?", defendant answered: "Thirty, thirty-five"; and that on one occasion he told this woman to go on home from the theater while he was holding defendant's hands to keep her from starting a fight; he admitted that "one night, Friday, maybe every other week or something," he would be away from home and he had a room at another place and he was seeing this other woman at her home. He admitted having been to her home on Sunday night before giving his testimony. On one occasion when she went to visit her son, Carl, within the last two years of the trial, plaintiff wrote defendant and told her to find a rich rancher. He stated he did this kiddingly "and it is all right with me if she would have". Plaintiff admitted that prior to the time he filed his complaint for divorce he was told that he could come back home. On cross-examination he further stated that he would not go home under any circumstances.

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Under any circumstances, an examination of the records of the Department of Social Services, Division of Child Welfare, for the years 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2



In considering alleged acts of violence the court will take into consideration the physical condition of the parties. *Levy v Levy*, 388 Ill. 179. It was not the intent of the legislature, nor is it the sense of the opinions of the review courts of this State, that a spouse should be able to sever the marriage relation by such slight acts as were here adduced in evidence; the charge of cruelty is a serious one which must be clearly proved. *Coolidge v Coolidge*, 4 Ill. App. (2nd) 205 - 217. Slight acts of violence by either spouse are not extreme cruelty within the statute authorizing divorce on such grounds. *Amberson v Amberson*, 349 Ill. 249; *Aurand v Aurand*, 157 Ill. 321; *Coolidge v Coolidge*, *supra*. Some cases hold that the cruelty must be such as to render continuous cohabitation dangerous. *Wesselhoeft v Wesselhoeft*, 369 Ill. 419; *Trenchard v Trenchard*, 245 Ill. 313; *Aurand v Aurand*, *supra*; *Ward v Ward*, 103 Ill. 477. Cruelty constituting ground for divorce means physical acts of violence, bodily harm or suffering, or such acts as endanger life or limb, or such as raise a reasonable apprehension of great bodily harm. *Wesselhoeft v Wesselhoeft*, *supra*; *Bissakumer v Bissakumer*, 324 Ill. App. 158. We are not satisfied from the evidence in this case that the husband has proven his case of extreme and repeated cruelty by a preponderance of the evidence.

As to the finding in the decree of divorce that defendant was guilty of desertion, it is admitted by plaintiff that at the time he left, he left the wife at the home of plaintiff above referred to. It is settled in Illinois that in order to support the charge of desertion by the spouse who physically leaves the home, the "reasonable cause" that justifies the departing spouse in leaving must be such that it would of itself entitle the party abandoning the home to a divorce. *Holmstedt v Holmstedt*, 383 Ill. 290; *Fritz v Fritz*, 138 Ill. 436; *Coolidge v Coolidge*, *supra*; *Swan v Swan*, 331 Ill. App. 295; *Frank v Frank*, 178 Ill. App. 557. We hesitate to hold that the evidence

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related herein on behalf of plaintiff is sufficient to successfully maintain his charge of desertion. His misconduct in part must have contributed to defendant's actions. It may be that the parties will never live together again, even though the wife has expressed her willingness and has offered to do so, but that is not a ground for divorce in Illinois. The decree granting divorce on the ground of constructive desertion was erroneous.

On the complaint of the husband charging extreme and repeated cruelty and desertion, the lower court granted a decree of divorce against the wife on February 14, 1955, from which decree the wife appealed to our court in case no. 10869. In the decree of divorce, the question of property rights, alimony and solicitors' fees was reserved by the court for further consideration. However, no further action was taken on the matter of the settlement of property rights and alimony because of the present appeal.

Thereafter, on April 21 the wife filed a motion in the lower court for allowance of temporary alimony during the pendency of her appeal, and for a reasonable sum for the defense. The lower court in an order dated May 13, entered May 20, decreed that plaintiff should pay to defendant for temporary alimony the sum of \$50.00 per week pending the appeal.

On May 24 the plaintiff filed a motion to vacate the order of May 13, and the lower court on June 8 entered an order reducing the amount of temporary alimony to \$35.00 per week. Said order further provided that defendant should also be paid the sum of \$50.00 per month from E. P. Carl from monies collected by him as rentals and from property sold under contract for deed, which property was owned jointly by the parties,

related herein on behalf of plaintiff is sufficient to successfully maintain his charge of desertion. His misconduct in part must have contributed to defendant's actions. It may be that the parties will never live together again, even though the wife has expressed her willingness and has offered to do so, but that is not a ground for divorce in Illinois. The decree granting divorce on the ground of constructive desertion was erroneous.

On the complaint of the husband charging extreme and repeated cruelty and desertion, the lower court granted a decree of divorce against the wife on November 12, 1935, from which decree the wife appealed to our court in case no. 10809. In the decree of divorce, the question of temporary alimony, alimony and solicitors' fees was reserved by our court for further consideration. However, no further action was taken on the matter of the retention of temporary alimony and alimony because of the present appeal.

Thereafter, on April 11 the wife filed a motion in the lower court for allowance of temporary alimony during the pendency of her appeal, and for a retainer fee for the defense. The lower court in an order dated May 13, entered an order granting that plaintiff should pay so calculated for temporary alimony the sum of \$50.00 per week pending the appeal.

On May 24 the plaintiff filed a motion to vacate the order of May 13, and the lower court on June 9 entered an order reducing the amount of temporary alimony to \$35.00 per week. Said order further provided that defendant should also be paid the sum of \$50.00 per month from May 1, 1935 from monies collected by him as rents and from property sold under contract for deed, which property was owned jointly by the parties,

and which payments were to be made to defendant from her share in said collected funds.

Plaintiff-appellant, in case No. 10891, attacks the order of the lower court awarding temporary alimony pending the defendant's appeal in the divorce suit on the ground that the lower court was without authority or jurisdiction to enter such an order after it had entered a final decree of divorce in favor of the plaintiff and against the defendant. The lower court must have based its order on Sec. 16, Chap. 40, Ill. Rev. Stat., 1955, the pertinent provision of this section being as follows:

" \* \* \* In case of appeal by the husband or wife, the court in which the decree or order is rendered may grant and enforce the payment of such money for her or his defense and such equitable alimony during the pendency of the appeal as to such court shall seem reasonable and proper. \* \* \* "

This section has been interpreted by this court and by the other Appellate Courts in several cases. This provision was originally found in Section 15 of Chapter 40 of the Illinois Revised Statutes and provided as follows:

"In case of appeal or writ of error by the husband, the court in which the decree or order is rendered, may grant and enforce the payment of such money for her defense, and such equitable alimony during the pendency of the appeal or writ of error, as to such court shall seem reasonable and proper."

It is to be noted that the only change in the provision is that Section 16 is reciprocal, applying both to the husband and the wife, so that, in case of an appeal by the wife, the court may grant and enforce the payment of money for his defense of the said decree.

In the recent case of *Arndt v Arndt*, 399 Ill. 490, the Supreme Court stated on page 496:

"The Appellate Courts of this State have repeatedly held that the only power to allow solicitors' fees to defend an appeal involving a matrimonial situation is by virtue of Section 15 of the Divorce Act. \* \* \* There is no statute in this State requiring the payment of legal fees or suit money in cases of annulment and it would appear that the order of the

and which payments were to be made to defendant from her estate.

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WILLIAM J. HARRIS, JR., President, American Telephone & Telegraph Co.

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and the following information:

and was known to the CIA and several other agencies.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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"The Appellate Court in this case have unanimously held that the only power to allow additional taxes is by virtue of Section 15 of the Charter Act. There is no statute in this State regarding the payment of legal fees or this money in cases of judgments and it would appear that the order of the

court in the present case in ordering such payments was without authority."

In the case of *Buehler v Buehler*, 373 Ill. 626, the Supreme Court in construing the present section of the statute held that the statute did not authorize alimony or solicitors' fees for appellant's solicitor but only for defense pending an appeal.

In the case of *Bissekumar v Bissekumar*, 325 Ill. App. 257, this court held that the above provision in the statute did not authorize either alimony or solicitors' fees for appellant from the decree denying divorce, the court further holding that the lower court was empowered to require payment of money only for defense of appeal.

In the case of *Shaffer v Shaffer*, 219 Ill. App. 200, the question arose as to whether, where a wife files a bill for divorce and charges her husband with desertion and adultery and there is a trial, and the chancellor orders the bill dismissed for want of equity, she is entitled to an order that, pending the appeal from the decree against her, her husband should pay to her alimony, solicitors' fees and the various costs of the suit upon appeal. The court quoted from Section 15, Chapter 40, which was incorporated into Section 16 of Chapter 40, and held at page 204:

"Inasmuch as in Section 15, Chapter 40, supra, it is provided affirmatively that in case of appeal or writ of error by the husband, the court may grant and enforce payment of suit money for her defense during the pendency of the appeal or writ of error, it would seem to follow that the legislature did not overlook the case where the wife failed in the lower court, but intended definitely to exclude any right on the part of the wife to a decree for solicitor's fees, alimony and suit money where she has been defeated in the trial court and the suit was still pending in a court of review."

In *Seeger v Seeger*, 154 Ill. App. 38, the husband obtained a decree of divorce on the grounds of adultery, and the wife sought the allowance of solicitors' fees and money with which

count in the present case of the present case

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

lowest courts was an appeal to a higher court to review the  
first degree being a violation of the law.  
According to the law of the state of California, a  
person who is convicted of a crime in the state of California  
may appeal to the state supreme court for review of the  
first degree being a violation of the law.  
The state supreme court has the power to review the  
first degree being a violation of the law.  
The state supreme court has the power to review the  
first degree being a violation of the law.

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1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its policy. This is due to the fact that the Government has not been able to secure the necessary funds to carry out its policy.

IN THE COURT OF THE DISTRICT OF COLUMBIA

about the allowance of solicitor fees and money advanced  
a decree of divorce on the grounds of adultery, and the costs



to prosecute an appeal. This the court denied and it was argued by the wife that this relief should have been granted her. On page 40, the court said:

"Where a divorce case is decided in favor of the wife and the husband takes an appeal, it is highly proper that the wife should be granted the means wherewith to defend the decree, at least unless she has sufficient means of her own. But where the wife is defeated, we do not recognize the duty of the court to award her further suit money."

To the same effect is *Balswic v Balswic*, 179 Ill. App. 118, wherein the court in construing said section 15 said, on page 126:

"We hold that there is no statute authorizing an allowance of suit money and solicitor's fees to prosecute an appeal by the wife from a decree of divorce against her for adultery."

While defendant contends that the order deals with trust funds, which belong to her and plaintiff, and for that reason the cases cited in this opinion are inapplicable, an examination of the motion filed by defendant on April 21 and of the subsequent orders of the court entered on May 13 and June 8, refutes her contentions.

In her said motion filed April 21, defendant moved that plaintiff be required to pay to defendant at regular intervals, a reasonable sum as temporary alimony, costs for appeal and attorney's fees, and the motion concluded with the prayer that an order be entered requiring plaintiff to pay a reasonable sum as equitable alimony during the pendency of these proceedings and for a reasonable sum for her defense of the matter and reasonable attorney's fees. The order entered May 13 states that the matter comes on for hearing on defendant's motion for temporary alimony, appeal costs, and attorney's fees and makes the finding that there had never been in the cause any waiver of alimony and ordered plaintiff to pay defendant the sum of \$50.00 per week for her support. The order of June 8 specifically provides for the

by the wife that this relief should have been granted to her.

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payment of the reduced amount of \$35.00 per week "as temporary alimony". The next to the last paragraph of said order of June 8 provides: "It is, therefore, ordered, adjudged and decreed by the Court that the order dated the 13th of May, 1955, and entered the 20th of May, 1955, pertaining to temporary alimony be, and the same is hereby, modified, \* \* \*". The final paragraph of said order of June 8 makes the further provision for the payment to defendant of monies collected by E. P. Carl in the alleged trust.

The orders allowing temporary alimony were erroneous.

This then leaves for consideration, the action of the lower court in dismissing counter-plaintiff's counterclaim for separate maintenance. From the evidence in this case, it is apparent that one of the principal causes of the difficulties between these parties was the presence of the other woman with whom plaintiff had been keeping company since 1952. While we do not in this opinion excuse counter-plaintiff's conduct as shown by the evidence in this case, we feel that the ends of justice will better be served by a retrial of the case on the counterclaim for separate maintenance, at which time the lower court can more fully inquire into the conduct of counter-plaintiff, and as to whether such conduct should bar her; and, if not, then further evidence could be heard as to the means and income of each party.

For the reasons indicated, the decree of the circuit court in case No. 10869 granting plaintiff a divorce, and the orders of court directing plaintiff to pay temporary alimony, are reversed. The cause is remanded for further proceedings on the counterclaim for separate maintenance. in case No. 10891 directing

Reversed and remanded.

*Dove R. Conover*  
*Chas. J. Conover*



No. 10859

Agenda No. 7

FILED

In The

JAN 5 - 1956

APPELLATE COURT OF ILLINOIS

Second District

JUSTUS L. JOHNSON

Clerk Appellate Court Second Dist. October Term, A. D. 1955.

81A<sup>2d</sup> 200

GEORGE D. HALL, GRACE E. HALL,  
L. S. YOUNG, MARJORIE KUNKLE,  
JO ANN HANSON and FLORENCE  
THOMPSON, d/b/a LINCOLN FINANCE  
COMPANY, a Co-partnership,  
APPELLEES,

vs.

HAMILTON FIRE INSURANCE COMPANY,  
a corporation,  
APPELLANT.

APPEAL FROM THE CIRCUIT  
COURT OF WINNEBAGO  
COUNTY.

BOVALDI, -- J.

This is an appeal by Hamilton Fire Insurance Company, a corporation, defendant and counterclaimant, hereinafter referred to as Hamilton, from the judgment of the Circuit Court in the sum of \$12,741.91 in favor of plaintiff and counterdefendant, Lincoln Finance Company, in a trial before the Court without a jury. Plaintiff is a co-partnership consisting of 6 partners doing business as Lincoln Finance Company, hereinafter referred to as plaintiff. Plaintiff's claim is for return premiums on policies of insurance issued by Hamilton and cancelled prior to maturity by said Hamilton. Hamilton's counterclaim is for payment of the balance of the premiums alleged to be due on these policies.

This case is based on the second amended complaint of plaintiff alleging that Hamilton is a fire insurance company,

FILED

JAN 2 - 1938

JUSTUS L. JOHNSON

Chief Associate Court Second Judicial District

Second District

IN THE DISTRICT COURT OF THE

State of New Mexico

81-1-2

GEORGE D. HALL, GEORGE D. HALL, JR.,  
L. S. YOUNG, HAMILTON FINANCE COMPANY,  
JOHN HANCOCK AND TRUST COMPANY,  
TRUST COMPANY OF NEW YORK AND  
CONNECTICUT, as defendants,

vs.

HAMILTON FINANCE COMPANY,  
a corporation,

Plaintiff.

COMES NOW the Plaintiff,

This is to certify that the Plaintiff is a corporation, defendant and commercial bank, organized under the laws of the State of New Mexico, from the judgment of the District Court in the case of HAMILTON FINANCE COMPANY, as Plaintiff, and GEORGE D. HALL, GEORGE D. HALL, JR., L. S. YOUNG, JOHN HANCOCK AND TRUST COMPANY, TRUST COMPANY OF NEW YORK AND CONNECTICUT, as defendants, in a civil case No. 81-1-2, now pending in the District Court of the Second District, New Mexico. Plaintiff is a corporation organized under the laws of the State of New Mexico, doing business as Hamilton Finance Company, herein then referred to as Plaintiff. Plaintiff's place of business is located at the offices of insurance issued by Plaintiff and assigned under to Plaintiff by said Hamilton. Hamilton's certificate is for the payment of the balance of the premium alleged to be due on these policies.

This case is based on the second amended complaint of Plaintiff alleging that Hamilton is a life insurance company,

selling policies of insurance insuring automobiles against loss by fire, theft, tornado and collision; alleging further, that the plaintiff is a co-partnership financing automobile purchases by buying the conditional sales contracts on automobiles from dealers; and that Hamilton issued policies of insurance on the automobiles financed by plaintiff. The complaint further alleged that A. J. Kelso and Sons, Inc., hereinafter referred to as Kelso, was the general agent of Hamilton, with authority for and on behalf of defendant to enter into contracts for insurance; to accept applications and execute and deliver such policies and accept payment for premiums thereon; to cancel and accept notice of cancellation of such policies of insurance and to make remittances for all unearned premiums; and that during the month of August, 1950, the plaintiff, through its agent, Wilson and Wilson, a co-partnership hereinafter referred to as Wilson, entered into an oral agreement with the defendant, through its general agent, Kelso, whereby the plaintiff purchased and paid for a great number of policies of insurance from the defendant on financed automobiles, insuring the latter against loss by fire, theft, tornado or collision; that thereafter large numbers of these policies were from time to time cancelled by defendant, and, therefore, plaintiff became entitled to the return of the premium for the unexpired term of such cancelled policies.

The defendant filed an answer, denying the material allegations of the second amended complaint. Subsequently an amendment to the answer was filed setting forth that plaintiff, on or about August 1, 1950, commenced purchasing policies of insurance from defendant on behalf of themselves and of the owners of the various automobiles financed by the plaintiff; that said purchases of insurance were made through Kelso; that from August 1,

selling policies of insurance insuring automobiles against loss  
by fire, theft, collision, and collision; alleging further, that  
the plaintiff is a co-partner in the insurance business  
by paying the conditional sales contracts of automobiles from  
defendants; and that said policies of insurance on the  
automobiles insured by defendant. The complaint further alleged  
that A. J. Kelso and one, Inc., insureds referred to as  
Kelso, was the general agent of defendant, for and  
on behalf of defendant, in which defendant was represented  
to accept applications and policies and deliver and collect  
and accept payment for the same; to collect and pay  
notice of cancellation of said policies to the insureds and to pay  
premiums for the same; and to collect and pay the same to the  
of Kelso, Inc., the defendant, in which Kelso, Inc., was  
a co-partner in the insurance business; and that the  
other into an oral agreement with the defendant, Kelso, Inc.,  
General Agent, Kelso, Inc., to collect and pay the same to the  
in a trust fund to be held by Kelso, Inc., for the defendant  
on the part of Kelso, Inc., in which Kelso, Inc., was  
thrift, towards the defendant, and that the defendant, Kelso, Inc.,  
these policies were then to be collected by defendant, Kelso, Inc.,  
therefore, defendant became entitled to the benefit of the  
provision for the payment of a sum or such conditional policies.  
The defendant filed an answer, denying the material  
allegations of the second amended complaint, and denying an  
agreement to the same as alleged in the complaint.  
On or about August 1, 1934, defendant, Kelso, Inc., collected of  
insurance from defendant on behalf of themselves and of the owners  
of the various automobiles insured by the defendant; that said  
purchases of insurance were made through Kelso, Inc. from August 1,



1950, to May 1, 1951, the gross premiums on such purchases of insurance, after deducting return premiums on cancellations of certain of said policies of insurance with defendant, aggregated \$47,180.04; that the plaintiff paid Kelso the sum of \$16,667.96 in cash and paid directly to Hamilton \$2,348.75 in cash; that Kelso allowed plaintiff to set off against the aforesaid premiums, certain credits consisting of brokerage commissions of 10% allowed Wilson by Kelso, and refunds due plaintiff through Kelso for return premiums on cancelled policies of insurance purchased by plaintiff through Kelso from insurance companies other than Hamilton amounting to \$19,124.96; that Kelso thereby applied personal indebtedness owing from Kelso to plaintiff as payment on moneys due defendant; that Kelso was not authorized by defendant to accept payment of premiums on said policies of insurance purchased by plaintiff other than in cash or in credit for cancelled Hamilton insurance policies; that as a result plaintiff was indebted to defendant in the sum of \$19,124.96 for such unpaid premiums. Hamilton later filed a counterclaim alleging the aforesaid purchase by plaintiff of said policies of insurance from August 1, 1950, to May 1, 1951, with aggregate premiums amounting to the aforesaid sum of \$47,180.04; and alleging further that certain of said policies were cancelled, having the gross sum of \$21,780.27 by way of return premiums; leaving a balance of \$25,399.77 for gross premiums due Hamilton; that plaintiff had paid in cash the sum of \$19,016.72, leaving a balance due Hamilton of \$6,383.05. A reply was filed to the amendment to the answer and plaintiff filed answer to the counterclaim.

It is contended by Hamilton that Kelso was not authorized to accept payment of premiums in any form other than cash; that use of credits arising from return premiums upon cancellations

[illegible]

of insurance in other companies was binding only between Kelso and plaintiff and did not in any way affect the rights of defendant; that an agent to sell insurance, issue policies, and collect premiums, does not have the power to receive payment for those premiums by accepting credits due the insured from third persons; that the system of accounting used between Kelso and plaintiff, whereby Kelso permitted a set-off to plaintiff on cancellation premiums from other companies, constituted a breach of agency by Kelso, for which Hamilton was not liable; that there was no ratification by Hamilton of the system used by Kelso and plaintiff. It is further contended by Hamilton that even if it be assumed that Kelso was authorized to accept credits in payment of premiums, then the trial court erred in failing to allow Hamilton the 10% commission on gross return premiums paid to Wilson who was agent of plaintiff, and therefore the amount of the judgment is incorrect.

It appears that from August 1, 1950, to May, 1951, the plaintiff bought insurance from Hamilton through Hamilton's agent, Kelso, the premiums on which amounted to \$47,180.04; that Kelso was a general insurance broker selling automobile insurance for several insurance companies of the same type offered by Hamilton. The transactions for procuring insurance, paying for same, preparation of balance sheets and taking care of details of buying and cancelling of policies was conducted by Wilson as insurance brokers for plaintiff, but since there is no dispute concerning the status of Wilson all matters are referred to as being done by plaintiff. By agreement between plaintiff and Kelso, they would settle up their account between themselves once each month in the following manner: Wilson, as broker for plaintiff, would prepare an account sheet showing on one side the total number of policies purchased (including

of insurance in other companies was binding only between Kelson and plaintiff and did not in any way affect the rights of defendant; that an agent to sell insurance, license policies, and collect premiums, does not have the power to receive payment for those premiums by accepting credits due the insured from third parties; that the system of accounting used between Kelson and plaintiff, whereby Kelson credited a set-off to plaintiff on cancellation of premiums from other companies, constituted a breach of agency by Kelson for which Kelson was not liable; that there was no satisfaction by plaintiff of the system used by Kelson and plaintiff. It is further concluded by plaintiff that even if it be assumed that Kelson was authorized to accept a set-off from other companies, then the set-off could not be taken from the 10% commission on gross premium volume and on Wilson who was agent of plaintiff, and should be the agent of the defendant in this case.

It appears that from August 1, 1934, to May 1935, the plaintiff brought to Kelson from various sources the sum of \$1,200.00; Kelson, in turn, on which Kelson was \$1,200.00; that Kelson was a licensed broker and holder of various licenses for several insurance companies of the state of Ohio, offered by plaintiff. The commission for various insurance, paying for same, and various other expenses and taking care of details of buying and cancellation of policies was conducted by Wilson as insurance broker for plaintiff, but since there is no dispute concerning the amount of Wilson's commissions referred to as being done by plaintiff. It appears that between plaintiff and Kelson, they would settle on their account between themselves once each month in the following manner: Wilson, as broker for plaintiff, would prepare an account sheet showing on one side the total number of policies purchased (including

policies from Hamilton) which account sheet also showed the total amount due from plaintiff for gross premiums on these policies. On the other side of the account sheet was shown the gross amount of credit invoices due plaintiff for cancellations of policies, including policies of companies other than Hamilton. Plaintiff would then pay the balance remaining due to Kelso, less certain brokerage fees of 10% of gross premiums on each policy, which fees were retained by Wilson.

The written agency agreement, under date of August 15, 1950, between Hamilton, as principal, and Kelso, as agent, wherein Kelso was to retain 25% of the gross premium as its commission, provided, substantially, that the underwriting facilities of Hamilton were available to Kelso; Kelso had authority to receive and accept proposals for such contracts of insurance covering risks as Hamilton had authority lawfully to make, subject to various state statutes; to receive and accept proposals for insurance for such classes of risks as Kelso was authorized by Hamilton to insure; to collect, receive and receipt for premiums on insurance tendered by Kelso and accepted by Hamilton; to keep complete records of all his transactions with policy holders and Hamilton. Under the terms of said agreement, all premiums received by Kelso were to be held as Trustee for Hamilton, and the privilege of retaining commissions out of premiums was not to be construed as changing the relationship between Hamilton and Kelso; Kelso was not to commit Hamilton on adjustment or payment of claims, unless specifically authorized; Hamilton was to render to Kelso monthly, not later than the 15th of each month following that in which business was written, an account of money due Hamilton on business placed by Kelso, and the balance due Hamilton was to be paid by Kelso to Hamilton within 45 days from the end of the month in which the



business was written. The agreement concluded with the clause providing that the agency agreement superseded all previous agreements, whether oral or written, and could be terminated by either party at any time upon written notice to the other.

While defendant contends that Kelso in collecting premiums was acting only as trustee for defendant as provided in the agency agreement between defendant and Kelso, it would seem that a debtor-creditor relationship was established by defendant and Kelso at the very outset. Plaintiff, in purchasing its insurance from Kelso, had set up an accounting system whereby it paid Kelso only the balance remaining due on said policies, after deducting all return premiums due from Kelso on same. The result would have been the same had plaintiff paid Kelso the total amount of premiums due for all policies purchased, and then immediately have taken a refund for return premiums on all of said policies. This system of balancing accounts was not completely alien to the system employed between Kelso and defendant, as is shown by the written agency agreement between Hamilton and Kelso wherein it was provided that Hamilton was to render to Kelso monthly, not later than the 15th of each month following that in which business was written, an account of money due Hamilton on business placed by Kelso, and the balance due Hamilton was to be paid by Kelso to Hamilton within 45 days from the end of the month in which the business was written. This latter provision of the contract was never complied with by Kelso and was never insisted upon by defendant. The evidence discloses that from August, 1950, to early March, 1951, the accounting system between Kelso and plaintiff was satisfactory, for during this period, Hamilton made no complaint

business was written. The agreement concluded with the clause

providing that the agency agreement superseded all previous agreements, whether oral or written, and could be terminated by either party at any time upon written notice to the other.

While defendant contends that Kelso in collecting

premiums was acting only as trustee for defendant as provided in the agency agreement between defendant and Kelso, it would

seem that a debtor-creditor relationship was established by

defendant and Kelso at the very outset. Plaintiff, in transferring

its insurance from Kelso, had set up an accounting system whereby

it paid Kelso only the balance remaining due to said policies, after

deducting all return premiums due from Kelso on same. The

result would have been the same had plaintiff paid Kelso the

total amount of premiums due for all policies purchased, and

then immediately have taken a refund for return premiums on all

of said policies. This system of balancing accounts was not

completely alien to the system employed between Kelso and

defendant, as is shown by the written agency agreement between

Hamilton and Kelso wherein it was provided that Hamilton was

to render to Kelso monthly, not later than the 15th of each

month following that in which business was written, an account

of money due Hamilton on business placed by Kelso, and the

balance due Hamilton was to be paid by Kelso to Hamilton within

45 days from the end of the month in which the business was

written. This latter provision of the contract was never

complied with by Kelso and was never insisted upon by defendant.

The evidence discloses that from August, 1950, to early March,

1951, the accounting system between Kelso and plaintiff was

satisfactory, for during this period, Hamilton made no complaint



to either plaintiff or Kelso. It makes no claim now that the policies issued by its agent Kelso were issued without authority, or that they had no force and effect.

In addition to the system of balancing accounts stated above, Hamilton, by its written agency agreement, gave Kelso the underwriting facilities of the Company, with the power and authority to receive and accept proposals for insurance and to collect, receive and receipt for premiums on insurance accepted by the Company. The agreement provided that Kelso was to keep complete records and accounts of all Kelso transactions with policyholders, which accounts were open to inspection by Hamilton at all reasonable times, and concluded with the clause providing that the agreement could be terminated by either party at any time upon written notice to the other. There is no evidence in this record to indicate that from August, 1950, to early March, 1951, when large numbers of insurance policies were issued by Hamilton to plaintiff through Kelso, that Hamilton inspected the accounts of Kelso and found them to be wanting, or made any attempt to terminate the system adopted by Kelso and plaintiff. From the record it appears that Hamilton learned in February, 1951, that A. J. Kelso had been killed in an accident and that the latter's agency was in financial difficulty, yet Hamilton did not make any attempt at that time to repudiate the arrangement between plaintiff and Kelso. Later, and under date of April 11, 1951, Hamilton sent a letter to plaintiff whereby Hamilton confirmed the making of new arrangements in the handling of the Lincoln account through the Kelso Agency, but here again there was no action by Hamilton repudiating, revoking or denying the validity or efficacy of the prior arrangements between plaintiff

to either financial or other... policies issued by the... or that they had no force and effect... in addition to the... above, however, by the... the underlying... and authority to... and to collect... secured by the... was to... account with... the... when and... also by... other... other... those... of... through... and... the... it... also... agency... any... prohibited... hemlock... the... account... no action by... validity or efficacy of the...

and Kelso. This letter stated:

" \* \* \* you have not paid your account for the past three weeks. It is suggested that you make your check payable to the Hamilton Fire Insurance Company on the past three week statements on a gross basis and forward this check to Kelso, who will in turn add to it the check which he received for the first week's account in March and forward this amount to us."

In its said letter of April 11, 1951, defendant confirmed a telephone conversation of April 9 making new arrangements in the handling of plaintiff's account, but made no protest as to the prior system adopted by its agent Kelso and plaintiff. Said letter provided further as follows:

"In the future all policies will be written for your account on a current basis. By this it is meant that all payments that are made by you on policies written in The Hamilton Fire Insurance Company will be paid by you on a gross basis to the Kelso Agency and the checks are to be made payable directly to The Hamilton Fire Insurance Company. This means that any credits that you might have by virtue of cancellations or credits for other companies will not be taken into consideration. It is further agreed that you will continue to pay your account on a weekly basis to the Kelso Agency making the checks payable to the Hamilton Fire Insurance Company and the Kelso Agency will in turn forward these checks directly on to us. This practice will continue until further notice."

This letter terminated the system which had been in existence from the outset, and provided that plaintiff thereafter make checks payable directly to defendant. Thereafter, as shown by Stipulation Exhibit 6, defendant did accept payment of \$2348.76 in checks issued by plaintiff, made payable directly to defendant.

The facts in this case bring it within the rule of law as announced in *Mulhern v Public Auto Parks, Inc.*, 296 Ill. App. 238, wherein the court states, at page 243:

"The only question here is as to the extent of his authority. He was, so far as the

and Kaino. This letter stated:

" \* \* \* You have not paid your account for the past three weeks. It is suggested that you make your check payable to the Hamilton Life Insurance Company on the next three week statement on a gross basis and forward this check to Kaino, who will in turn send it to the check which he received for the first week's account in March and forward this amount to us."

In the said letter of April 11, 1931, defendant continued a telephone conversation of which a making new arrangements in the handling of plaintiff's account, but made no mention to the prior system adopted by the agent and plaintiff. said letter provided further as follows:

"In the future all policies will be written for your account as a cash value policy. This is to mean that all payments made by you on policies written after the Hamilton Life Insurance Company will be made by you on a gross basis as the Hamilton Life Insurance Company has been advised to do. This means that you should not have by virtue of accumulation or reserve for other companies which has been made considerable. It is further suggested that you will continue to let your account on a weekly basis to the Hamilton Life Insurance Company and the check payable to the Hamilton Life Insurance Company will be forwarded to us. This practice will continue until further notice."

This letter terminated the system which had been in existence from the outset, and provided that plaintiff's check was made payable directly to defendant. Thereafter, as shown by stipulation Exhibit C, defendant did accept payment of \$2348.76 in checks issued by plaintiff, none payable directly to defendant.

The facts in this case bring in within the rule of law as announced in *Williams v. Public Auto Parks, Inc.*, 293 Ill. App. 232, wherein the court stated, at page 233:

"The only question here is as to the extent of his authority. He was, so far as the

evidence discloses, the only person left in charge of the business of defendant. It was not necessary for plaintiff to prove actual authority. Defendant was as to plaintiff bound by the apparent authority of the attendant. In the absence of evidence tending to show the lack of authority every possible inference and intendment is in plaintiff's favor. The principal is just as much bound by authority, which through his acts he appears to give, as by that which has actually been given. (Nash v. Classen, 163 Ill. 409.) The scope of an agent's authority may be shown as well by circumstances as by proof of express authority. (Springfield Engine & Threshing Co. v. Green, 25 Ill. App. 106, 110.) As is said in 2 Corpus Juris Secundum, 1185, 1186, sec. 91, an agent ordinarily 'possesses the powers conferred directly upon him by the principal and certain incidental powers implied from those which have been thus conferred on the basis of necessity or custom, as well as such other powers as the principal has by his direct acts or by negligent omission or acquiescence caused or permitted persons dealing with the agent reasonably to believe that the principal has conferred and upon which such persons have relied.'"

To the same effect is Relaco Rosin Products Company, Inc., v National Casein Company, et al. (Abst.), 321 Ill. App. 159, 52 N.E. 2d 322, wherein the syllabi as reported in the North-eastern citation, states:

( "Agency may be established and its nature and extent shown by parol evidence whether it be direct or circumstantial, and if there be doubt about the extent of the agency reference may be had to the situation of the parties and the property, acts of the parties, and other circumstances germane to the question. Where the evidence shows one acting for another under circumstances implying a knowledge on the part of the supposed principal of such acts, a prima facie case of agency is established." )

Hamilton, having accepted benefits and having acquiesced in the system used by its agent, Kelso, whereby it received \$16,667.96 over a period of eight months, cannot now be permitted to repudiate the agreement. Its refusal to return the unearned premiums on policies purchased from



it is without foundation. Phillips v Continental Auto Ins. Assn., 227 Ill. App. 46; Morris & Co. v Rhode Island Ins. Co., 181 Ill. App. 500; Morris v Tillson, 81 Ill. 607. One who holds out another as his agent to act for him in a given capacity, and by his habits and course of dealing justifies the inference that such other is authorized to act as his agent, whether it be in a single transaction or in a series of transactions, will not be heard to deny the agency when the benefits as a result of such agency are first received and accepted by the principal, but later terminate to the detriment of the principal. Barnard & Co. v County of Sangamon, 190 Ill. 116; Williamson v McCann & Co., Inc., 2 Ill. App. (2d) 42 (Abst.); Morse v Illinois P. & L. Corp., 294 Ill. App. 498. In the instant case, there was conduct on the part of Hamilton, a previous course of dealing by its agent, Kelso, which was recognized or acquiesced in by Hamilton by the issuance of a large number of policies and the acceptance of the benefits of such previous course of dealing. Sufficient appears in this case to conclude that Kelso was acting within the power and scope of his agency authority.

In addition, Hamilton had many months to acquire knowledge of the arrangements between Kelso and plaintiff; it failed to make any protest during that period of time as to said arrangement which had resulted in mutual advantage to all; Hamilton had knowledge of the issuance of the large numbers of insurance policies under this arrangement; and yet Hamilton failed to repudiate immediately and unequivocally said arrangement in the April 11, 1951, letter which it sent to plaintiff. The facts disclosed by the record present two

it is without to addition. Phillips v Commonwealth, 100 Mass.  
181 Ill. App. 300; Morris v Illinois, 81 Ill. 603. The same  
holds out another as his agent to act for him in a particular  
capacity, and by his advice and course of dealing, justifies  
the inference that such other as authorized to act as his  
agent, whether it be in a single transaction or in a series  
of transactions, and he is bound to carry out the duty imposed  
the benefits as a result of such agency and it is not  
and accepted by the law, the fact that the agent is  
detriment of the principal. In the case of a single transaction,  
the agent, 191 Ill. App. 300; Morris v Illinois, 81 Ill. 603.  
2 Ill. App. 300. In the case of a series of transactions,  
the agent is bound to carry out the duty imposed by the law  
on the part of the principal, and the fact that the agent is  
its agent, which is a legal conclusion, and it is not  
admission by the law that a legal conclusion is reached by  
the assumption of the benefits of such agency and it is not  
dealing. The fact that the agent is bound to carry out the duty  
also was acting as the agent and it is not a legal  
authority.

In addition, Hamilton had knowledge of the fact  
knowledge of the agent's duties and the fact that  
it failed to make any protest during that period of time  
as to said arrangement which was entered in the record  
to all; Hamilton had knowledge of the fact that the  
numbers of insurance policies under this arrangement; and yet  
Hamilton failed to repudiate immediately and unequivocally  
said arrangement in the April 15, 1923, letter which is sent  
to plaintiff. The facts disclosed by the record present two



situations, both of which indicate ratification by Hamilton: On the one hand, the acceptance of the benefits, the issuance of the policies, the failure to investigate, protest or repudiate during the eight month period are sufficient grounds for holding that Hamilton was satisfied and, therefore, ratified the acts of its agent, Kelso. On the other hand, if as argued by Hamilton it had no knowledge of the system of accounting adopted between plaintiff and Kelso until the death of A. J. Kelso, Sr., then Hamilton's failure to repudiate the purported unauthorized acts of its agent, Kelso, immediately, and the apparent acceptance of, or at least acquiescence in, the system as shown by the correspondence between Hamilton and plaintiff commencing with the letter of April 11, 1951, whereby new arrangements were put into effect, are sufficient grounds for holding that Hamilton ratified the acts of its agent, Kelso. Canning Co. v Brokerage Co., 213 Ill. 561; Barbour v Mortgage Co., 102 Ill. 121; Mark Greer v Shell Petroleum Corp., 281 Ill. App. 238; Pauly v Madison County, 199 Ill. App. 225. In its letter to plaintiff of June 20, 1951, defendant, by its president, admitted the following:

"I can appreciate the fact that you are not responsible for the shortages of the Kelso account prior to the March business."

It was the duty of the trial court in this case to weigh the evidence. He saw and heard the witnesses. Unless his findings are against the manifest weight of the evidence, we would not be warranted in disturbing the judgment. Haddad v Marble, 328 Ill. App. 315, 65 N.E. 2d 575; Mayflower Sales Co. v Frazier, 325 Ill. App. 314; Roberts v City of Rockford, 296 Ill. App. 469; Keefer Coal Co. v United Elec. Coal Cos., 291 Ill. App. 477. We are of the opinion that the trial court's findings are amply supported by the evidence in this case. We find no error

477. We are of the opinion that the trial court's findings are amply supported by the evidence in this case. We find no error.

in the trial court's ruling that defendant was bound by the acts of its agent Kelso, and that plaintiff was entitled to recover in accordance with the system of accounting adopted by plaintiff and said agent of the defendant.

Lastly, it is contended by defendant that the amount of the judgment is incorrect. This contention is based upon the fact that Wilson, plaintiff's brokers, retained a 10% commission on the gross premiums paid by plaintiff for the insurance in question.

It was stipulated that all of the policies issued by defendant through Kelso under their agency agreement were issued to plaintiff and the various purchasers whose conditional sales contracts plaintiff owned; it was further stipulated between the parties that as the cancelations of policies of insurance occurred, plaintiff reimbursed its co-insured on each canceled policy in the amount due such co-insured for the return premium thereon. The exact amount of unearned premiums was stipulated by the parties hereto. It is undisputed that defendant canceled these policies. This being true, Hamilton was required, upon cancelation of the coverage, to repay to the insured the amount of such unearned premiums in accordance with the provisions of the policies of insurance, the applicable provision being found in Paragraph No. 13 under "Conditions" in all of the policies. It provided as follows:

"If the company cancels, earned premiums shall be computed pro-rata. Premium adjustment \* \* \* shall be made as soon as practicable after cancelation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the insured."

There is nothing in the policy providing for payment of return

in the trial court's ruling, the defendant was found to be  
guilty of a crime, and the defendant was sentenced to  
prison in accordance with the provisions of the law.  
by the trial court and the defendant.

Secondly, it is contended by the defendant that the  
of the defendant is incorrect. The defendant is not  
the defendant is not a criminal, and the defendant is  
a citizen of the United States, and the defendant is  
entitled to the same rights as any other citizen.

It is further contended by the defendant that the  
of the defendant is incorrect. The defendant is not  
a criminal, and the defendant is not a citizen of the  
United States, and the defendant is not entitled to the  
same rights as any other citizen.

Thirdly, it is contended by the defendant that the  
of the defendant is incorrect. The defendant is not  
a criminal, and the defendant is not a citizen of the  
United States, and the defendant is not entitled to the  
same rights as any other citizen.

Fourthly, it is contended by the defendant that the  
of the defendant is incorrect. The defendant is not  
a criminal, and the defendant is not a citizen of the  
United States, and the defendant is not entitled to the  
same rights as any other citizen.

Fifthly, it is contended by the defendant that the  
of the defendant is incorrect. The defendant is not  
a criminal, and the defendant is not a citizen of the  
United States, and the defendant is not entitled to the  
same rights as any other citizen.

Sixthly, it is contended by the defendant that the  
of the defendant is incorrect. The defendant is not  
a criminal, and the defendant is not a citizen of the  
United States, and the defendant is not entitled to the  
same rights as any other citizen.

There is nothing in the policy providing for a right of return

premium to insured less the 10% brokerage commission retained by Wilson.

From the accounts current and checks of Wilson thereto attached, as shown by the many exhibits in evidence in this case, it is clear that plaintiff paid in full the gross premiums on all of the insurance in question. Under the agency agreement Kelso was entitled to retain 25% of the premium as its commission. Hamilton expected to, and did, receive only the remaining 75% of the gross premium. This is clearly the manner in which the transactions were commenced when the agency agreement, together with the payments made by Kelso to Hamilton on its account, are considered. The stipulation of the parties shows nine separate payments by Kelso to defendant, beginning with the November 14, 1950, payment for August, 1950, and continuing to the date of the last payment by Kelso to defendant on May 8, 1951. From the very outset, defendant did not insist on a strict compliance with the forty-five day payment provision of the contract between it and Kelso, as the above payment for August, 1950, was not made by Kelso until November 14, 1950.

The next statement which defendant submitted to Kelso was for business written during the month of September, 1950. It is interesting to note that in this early period of the business transactions between Kelso and defendant, their account contained deductions for return premiums on policies canceled by defendant, and Kelso's commission of 25% was based on the gross premiums less the return premiums. Stated in terms of the dollars and cents transactions of the said parties, the premiums on business written in September, 1950, by Kelso for defendant amounted to \$7,847.78. From this amount there



was deducted return premiums of \$214.64, leaving a balance of \$7,633.14 net premium due defendant by Kelso. From the latter amount, Kelso deducted its 25% commission, and the balance of \$5,724.85 was sent by Kelso to defendant on December 20, 1950. Under their written agency agreement, the statement for September was due within forty-five days of the last day of September, 1950, i.e. November 15, 1950. However, an examination of the stipulation between the parties hereto shows that the aforesaid payment, less Kelso's commission, was not made until December 20, 1950.

Although Kelso transacted considerable business during the months of October, November and December, 1950, and during the months of January, February, March, April and May, 1951, and several months thereafter, no payments were made by Kelso to defendant after the aforesaid payment of December 20, 1950, until two payments were made in March, 1951, four payments in April, 1951, and the final payment on May 8, 1951.

Defendant, not plaintiff, exercised its right to cancel these policies. When it did so, it put in operation the aforesaid provision No. 13 of the policies of insurance as to payment to insured of the amount of the return premium. The policy was prepared and issued by defendant. Had it been entitled to the 10% paid Wilson as broker, it should have inserted said provision in its said policies, or in its agreement with Kelso, and in turn, this provision should have been incorporated in the oral agreement between plaintiff and Kelso wherein Kelso acquired plaintiff's business, part of which went to defendant. As stated in *Domeyer v O'Connell*, 364 Ill. 467, @ 470:





"An implied intention is one necessarily arising from language used or a situation created by such language. If such intention does not necessarily arise it cannot be implied. On the other hand, absence of a provision from a contract is evidence of an intention to exclude such provision. Certainly, the fact of such absence cannot, of itself, give rise to an implied intention to include it."

The trial court properly held that defendant was not entitled to recover of plaintiff the 10% brokerage commission paid Wilson by defendant's agent Kelso.

Judgment Affirmed.

*Gov. P. P. Concur*

Crow, J. Concur

"An implied intention is one necessarily arising from language used in a situation created by such language. If such intention does not necessarily arise it cannot be implied. On the other hand, absence of a provision from a contract is evidence of an intention to exclude such provision. Certainly, the fact of such absence cannot, of itself, give rise to an implied intention to include it."

The trial court properly held that defendant was not entitled

to recover of; liability for the 10% brokerage commission held

in favor of defendant's estate.

Respectfully submitted,

Crow, J. Conner

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8 I.A.<sup>2d</sup> 237

R. A. MULDOON,

APPEAL FROM

Appellee,

CIRCUIT COURT,

v.

FLORENCE B. DEDDO,

COOK COUNTY.

Appellant.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint in the nature of a creditor's bill praying that it be decreed that Theresa Deddo is the owner of an interest in certain real estate, on the ground that Theresa Deddo conveyed her interest with the intention of defrauding her creditors. The cause was referred to a master and, in conformity with the findings of the master and the recommendations in his report, a decree was rendered in favor of plaintiff. Defendant appeals.

The material facts are substantially uncontroverted. In July 1946 Dominic Deddo, a bachelor, purchased premises in the Village of Palatine, Cook County, Illinois, for the sum of \$8,500. Dominic paid \$2,500 in cash and secured a mortgage loan for the balance. The premises were improved with a frame house and garage. July 9, 1947 Dominic conveyed the premises in controversy to his parents, Leonard Deddo and Theresa, his wife, as joint tenants.

When the premises were purchased in 1946 by Dominic, his father Leonard Deddo opened a shop and office where he conducted his plumbing business. Shortly afterward Leonard Deddo organized a corporation which was subsequently dissolved.

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After dissolution of the corporation the plumbing business was operated as a partnership by Leonard Deddo and his son Dominic, as equal partners. During this period of about three years Daniel Deddo, another son of Leonard, was employed by the partnership and received regular wages. Leonard Deddo, aged 73, wished to retire from the plumbing business. Theresa Deddo, his wife, who was ailing, felt that a change of climate would be beneficial to her. The elder Deddos decided to move to California. In the latter part of 1953 Leonard Deddo and his sons Dominic and Daniel formulated a plan for Leonard's retirement and for the disposition of his plumbing business and the premises here involved. Daniel Deddo was to purchase from his father, Leonard, the good will of the plumbing business and the premises in Palatine. November 28, 1953, pursuant to the plan, Leonard and Theresa, his wife, reconveyed the premises to Dominic by quit-claim deed. In receiving the title to the premises in question Dominic acted as nominee so that he could obtain a new mortgage loan. Dominic obtained a new loan for \$7,500. The proceeds of this loan were paid out on March 14, 1954. After paying off the balance due on the old mortgage the remainder of \$3,842.55 was paid to Dominic. Dominic in turn delivered this check to his brother Daniel who added sufficient cash to purchase another check for \$4,000 payable to his brother Frank Deddo residing at Glendale, California. The \$4,000 check was sent to Frank Deddo and used by him to purchase a home for his parents Leonard and Theresa Deddo in Glendale, California. April 14, 1954 Dominic conveyed the premises here in controversy by warranty deed to defendant

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Florence Deddo, the wife of Daniel Deddo. June 7, 1954, plaintiff recovered a judgment against Theresa Deddo for \$1,995, based on a liability incurred in 1933.

The master found that other than the premises in question Leonard and Theresa Deddo had no assets when they moved to California and the conveyances of the premises "would render" Theresa Deddo, the judgment debtor, insolvent; that Daniel and Dominic Deddo knew of the pending litigation against their mother Theresa; that this knowledge is chargeable to defendant Florence Deddo; and that neither Dominic nor Florence Deddo can be considered bona fide purchasers.

Defendant contends that the complaint should have been dismissed for want of equity on the ground that the evidence fails to establish fraud in fact or in law.

The undisputed evidence shows that Daniel Deddo paid his parents Leonard and Theresa Deddo the sum of \$7,582.45 for the premises.

At the close of the testimony defendant moved to reopen the hearing for the purpose of introducing evidence tending to show that Daniel Deddo also agreed to pay his father as part of the consideration for the purchase of the premises here in question and the plumbing business \$300 monthly for life and that at the time of the hearing the aggregate payments made by Daniel to his father amounted to \$2,400. Defendant's motion was denied. We think this motion should have been allowed and the evidence received. But not considering the proffered testimony we think the consideration paid by Daniel for the premises was adequate.





There is no evidence in this record tending to show that Theresa Deddo was rendered insolvent by conveying her interest in the premises. It is undisputed that she and her husband received \$4,000 in cash for the premises. This sum is in excess of plaintiff's judgment. In addition to the cash payment of \$4,000 to the elder Deddos, a mortgage debt on the premises of \$3,582.45 was retired.

The law is well established that before the burden to disprove fraud could be cast upon the defendant it was necessary for the plaintiff to introduce evidence that there was no valuable consideration. (McKey v. McKean, 384 Ill. 112, 124.) No evidence was introduced by plaintiff tending to prove inadequate consideration.

In Woodham v. Miller, 319 Ill. App. 388, the court refused to set aside a conveyance of property by the parents to their daughter during the pendency of another proceeding against the parents. The court said, p. 393:

"An action to set aside a fraudulent conveyance such as is involved in the instant case falls into two classes: (1) Where the conveyance is entered into with actual fraudulent intent on part of both parties to hinder and delay creditors --sometimes referred to as fraud in fact; and (2) Where, from the terms of the agreement or the nature of the transaction itself, the conveyance is rendered fraudulent as a conclusive presumption of law--sometimes referred to as fraud in law (Second Nat. Bank of Robinson v. Jones, *supra*).

"In the first category, a conveyance may be void as against a creditor, even though a full and fair consideration was paid, and the grantor was solvent when making the conveyance, if in fact such conveyance was made for the fraudulent purpose of hindering and delaying the creditor in the collection of his debt. Under the second class of cases, however, it is essential that insolvency at the time of the making of the conveyance be alleged and proved, and the return of execution 'nulla bona' does not supply such proof (Iles v. Heidenreich, 201 Ill. App. 619, 626, 627.)"

7. The following are the results of the regression analysis:

[illegible][illegible][illegible]

In the present case the plaintiff having charged fraud the burden of proof is upon him to establish it by clear, convincing and satisfactory evidence. This proof is lacking.

From a careful examination of the record we are of the opinion that the evidence is not sufficient to support the master's finding or the decree and that the complaint should have been dismissed for want of equity. The decree is therefore reversed and the cause is remanded with directions to dismiss the complaint for want of equity at plaintiff's costs.

REVERSED AND REMANDED  
WITH DIRECTIONS.

FEINBERG AND KILEY, JJ., CONCUR.

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MAURICE E. THOELE,

Appellant,

v.

S. H. MAZEL and HELEN MAZEL, d/b/a  
MAZEL AND COMPANY; SUPERIOR PAINT  
STORES, INC., a corporation, WILLIAM  
THOELE, d/b/a ATOMIC VENETIAN BLIND  
SERVICE,

Defendants,

PHILLIP G. BURIEGI, d/b/a Elm Die  
Cutting,

Appellee.

8 I.A.<sup>2d</sup> 237

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order dismissing his complaint upon the motion of defendant Phillip G. Buriegi. Plaintiff electing to stand upon his amended complaint, the court entered judgment for costs against plaintiff as to said defendant. The cause remained pending against the other defendants.

The complaint is in one count. As to the defendants Mazel, it alleges they were in the business of selling stepladders; that the stepladder sold by them and used by plaintiff was not made of good and substantial material, and was weak, insecure and unsafe for the purpose for which it was sold by said defendants, and was dangerously defective.

As to the defendant Superior Paint Stores, it alleged that it procured the said ladder in question from defendants Mazel and sold it at retail to defendant William Thoele, for whom plaintiff worked, and in the performance of his duty was obliged to use said ladder; and that said defendant Superior Paint Store should have known the condition of said ladder.

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ADAMS, J. H. 1897. THE NEW YORK PUBLIC LIBRARY  
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As to defendant William Thoele, it alleged he employed plaintiff, his son, and was under duty to supply him with a reasonably safe ladder with which to perform his duties of installing Venetian blinds; and that said defendant furnished plaintiff with the defective and imminently dangerous stepladder in question.

As to defendant Buriegi, it alleged that said defendant requested installation of Venetian blinds in his place of business, which were furnished by defendant Thoele; that plaintiff entered the place of business of said defendant Buriegi to install the Venetian blinds; that as he stood on the stepladder in question to install said Venetian blinds, the side piece near the bottom of said ladder "suddenly broke when said stepladder tilted to the side of said side piece and away from the window where the plaintiff was installing said venetian blinds, causing the plaintiff to be violently thrown to the floor off said stepladder, as a direct and proximate result of the depressed, sunken, worn-out and uneven condition of the floor on which said stepladder was then and there standing," of which condition of the floor defendant Buriegi had knowledge for a long time prior to the grievances complained of. It is further alleged that the negligence of the defendants caused the injuries.

One in control of premises, who invites another thereon is not an insurer of the safety of the invitee. He is only required to use reasonable care to see that the premises are reasonably safe for the ordinary usual use for which said premises are intended. Ellguth v. Blackstone Hotel, Inc.,

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340 Ill. App. 587, affirmed 408 Ill. 343; Schmelzel v. Kroger Groc. & Baking Co., 342 Ill. App. 501; Devaney v. Otis Elevator Co., 251 Ill. 28; Antibus v. W. T. Grant Co., 297 Ill. App. 363.

The complaint as to defendant Burlegi is insufficient because (1) it fails to allege that plaintiff did not and could not observe the condition of the floor, there being no allegation that the place was in darkness; (2) the allegation in the complaint that the floor was depressed, sunken, worn-out and uneven, is not sufficient in itself to constitute an unsafe or dangerous condition under the circumstances alleged in the complaint; and (3) the pleading being construed against the pleader, it is lacking in any allegation of fact excusing plaintiff not only from seeing the condition of the floor, but placing his ladder upon a floor in that condition.

It has been held that a municipality, whose duty it is to maintain its sidewalks in a reasonably safe condition, is not liable for its failure to maintain its sidewalks at an even level. McKinley v. City of Chicago, 299 Ill. App. 58; Walter v. City of Rockford, 332 Ill. App. 243, and Heston v. Jefferson Bldg. Corp., 332 Ill. App. 585, where it was held that it was not the duty of the owner of the premises to maintain an absolute level of the floor.

The law charges a person with the duty of seeing that which is clearly visible and within the range of vision. There is nothing alleged in the complaint which would excuse plaintiff's failure to see what was clearly visible. Donnelly

Figure 1

1. The purpose of this report is to provide a summary of the results of the study conducted by the research team.

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-4-

v. Real Estate Management Corp., 342 Ill. App. 453; McKirchy  
v. Van Sweringen, 333 Ill. App. 158 (Abst.) (Leave to  
appeal denied).

The judgment of the Superior Court is correct,  
and it is affirmed.

AFFIRMED.

LEWE, P.J. AND KILEY, J., CONCUR.

$$A_{\text{max}}(N) = (S_1 + \dots + S_N) \cdot \frac{1}{N} \cdot \frac{1}{\sqrt{2\pi}} \cdot \frac{1}{\sigma} \cdot e^{-\frac{1}{2\sigma^2}} \cdot \frac{1}{\sigma}$$

COMMISSION OF THE EUROPEAN COMMUNITIES

• *Journal of the American Medical Association*, 1997; 277: 1001-1005

the 1990s, the number of people in the world who are under 15 years of age is expected to increase from 1.1 billion to 1.5 billion. The number of people aged 65 and over is expected to increase from 250 million to 450 million. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion.

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SUNBEAM CORPORATION, an Illinois corporation,

Appellee,

v.

RICHARD'S APPLIANCES, INC., an Illinois corporation, and RICHARD L. GREER and JANICE GREER, co-partners doing business under the trade name and style of THE HOUSE OF GREER,

Defendants,

RICHARD L. GREER and JANICE GREER,

Appellants.

81.A.<sup>2d</sup> 238

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT

OF COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Defendants Greer, a co-partnership doing business as The House of Greer, appeal from the order granting plaintiff a preliminary injunction restraining the co-partners from "advertising, offering for sale or selling in the State of Illinois any of Plaintiff's commodities at less than the respective prices set forth in Plaintiff's Retail Price Supplement 46 attached hereto (or at less than such prices as may hereafter be stipulated pursuant to Plaintiff's fair trade contracts and called to said Defendants' attention by written notice); from making any discount, allowance, gift, rebate or concession in connection with the advertising, offering for sale or selling of any of said commodities at said prices; from advertising, offering for sale or selling any of said commodities at less than said prices by means of any subterfuge, device, combination, sham or other indirection."

Defendants moved to strike the complaint for reasons appearing on its face, and that motion together with plaintiff's

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*Journal of Interpersonal Violence* 28(10)

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*Journal of Management Inquiry*, Vol. 19 No. 1, March 2010  
DOI: 10.1177/1056492609358000  
© The Author(s) 2010

1. *Journal of the American Medical Association*, 1997; 277: 1033-1036.

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motion for preliminary injunction were heard together, no answer to the complaint having been filed by defendants. The court overruled the motion to strike and granted the motion for the preliminary injunction.

In support of its motion for preliminary injunction, plaintiff submitted an affidavit of Robert P. Gwinn, of about 40 pages, together with exhibits attached thereto, which set up facts showing the course of conduct of defendants, to support the charge that defendants were violating the Illinois Fair Trade Act, Ill. Rev. Stat., Ch.121-1/2, §§188-191.

Section 2 of that statute provides:

"Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby." (Ill. Rev. Stat., Ch. 121-1/2, §189.)

The order for the injunction recites that the court "considered the affidavit of R. P. Gwinn with attachments and the verified Complaint filed herein."

We agree with defendants that the court should not have considered the affidavit of Gwinn. The declared rule of this State is that the court has no right to consider affidavits either on a motion to dissolve an injunction before any answer or pleadings are filed by the defendants, or any affidavit or evidence offered by plaintiff in support of the motion for preliminary injunction, when no answer is on file. Dunne v. County of Rock Island, 273 Ill. 53, 57; McNevin v. Stoolman, 235 Ill. App. 449, 455; Lee v. Morris, 326 Ill. App.





555; Crown Bldg. Corp. v. Monroe Amusement Corp., 326 Ill. App. 430, 437.

In determining whether the court was justified in issuing the preliminary injunction, we will not consider the affidavit submitted to the court upon the hearing, but shall decide it upon the verified complaint alone. Lee v. Morris, supra; Cohen v. Sparberg, 316 Ill. App. 140, 142.

The complaint, in substance, alleges that plaintiff is an Illinois corporation engaged in the manufacture of electrical appliances, and has established a fair trade price structure under the Illinois Fair Trade Act as well as the Federal Fair Trade Act for the distribution of its appliances; that it sells its appliances in all fair trade states, including Illinois, only to distributors who enter into a contract to resell them at not less than the prices stipulated by plaintiff, and only to retailers who also by contract agree not to resell for less than the prices stipulated by plaintiff; that all of such appliances carry its trade-marks, which distinctly identify plaintiff's appliances; and that defendants conduct a mail-order business, using a catalogue, offering for sale appliances of plaintiff with its trade-mark, at prices under those stipulated by plaintiff, with knowledge of plaintiff's fair price structure and said contracts existing between plaintiff and distributors and retailers. It is alleged upon information and belief that the catalogue used in the so-called mail-order business of defendants is a mere sham and subterfuge to avoid any implication that they were selling to retailers for resale to consumers.



Defendants here urge that the complaint, upon such information and belief, is not sufficient, and that the complaint lacks any definite allegation of fact that defendants offered or sold any such appliances to any retailer or consumer at a price below that fixed by plaintiff.

The complaint has attached thereto exhibits consisting of photostatic copies of pages found in defendants' catalogue, each of which exhibits contains pictures of the appliances offered by defendants together with the prices. These prices are alleged to be below plaintiff's fixed price. There is also attached to the complaint as exhibit 8 a letter from one, M. J. Wyant, Steubenville, Ohio, addressed to defendants, ordering one of the appliances with plaintiff's trade-mark thereon, at a price below plaintiff's fixed price. There is a positive allegation in the complaint that in response to the order contained in said letter, defendants sold, shipped and delivered the same to said Wyant, together with the invoice attached as an exhibit to the complaint, which disclosed a sale at the price below the fixed price. These exhibits attached to the complaint must be considered a part of the complaint for all purposes. Civil Practice Act, Sec. 36, Ill. Rev. Stat. Ch. 110.

We think the complaint states a sufficient cause of action for injunctive relief to restrain the violation of the Fair Trade Act. The preliminary injunction does no more than preserve the status quo until a hearing upon the merits.



The attack made upon the complaint that its verification is based on information and belief is without merit. It recites that the affiant "has read the foregoing Complaint and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true."

The chancellor did not abuse his discretion in granting the preliminary injunction, and accordingly the order is affirmed.

AFFIRMED.

LEWE, P.J., and KILEY, J., CONCUR.

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WITNESSES

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Abstract  
Gen. No. 10872

Agenda No. 15

IN THE

FILED APPELLATE COURT OF ILLINOIS

DEC 1 - 1955

SECOND DISTRICT

JUSTUS L. JOHNSON OCTOBER TERM, A. D. 1955.

Clerk Appellate Court Second Dist.

81.A. 2<sup>nd</sup> 4

LUDWIG R. ISRAEL,

Plaintiff-Counterdefendant- Appellee)

vs.

MILDRED F. ISRAEL,

Defendant-Counterplaintiff-Appellant)

) Appeal from the

) Circuit Court

) Du Page County.

CROW, J.

This is an appeal from an order denying a petition filed November 4, 1954, by the defendant, the mother, Mildred F. Israel, for a modification in a divorce decree and a change of custody of two minor children of the parties. The plaintiff, Ludwig R. Israel, and the defendant were married in 1938, and were divorced October 19, 1953, upon a counterclaim of the defendant mother on the grounds of extreme and repeated cruelty. The decree gave the care and custody of the children, Louis Israel, then 12 years, and Nancy Israel, then 4 years old, to the plaintiff father, subject to certain rights of visitation by the mother, the mother to have custody the 2nd, 3rd, and 4th weekends in each month from Saturday morning to Sunday night, on alternate 5th weekends when there were five weekends in a month, on alternate holidays, for one month in the summer, and on alternate birthdays of the children, pursuant to an agreement of the parties, the decree being approved as to form by both parties and their attorneys.

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DEC 1 - 1978

JUSTICE L. JOHNSON  
Chief Appellate Court Building



The petitioner does not complain of any non-compliance on the part of the father with the parties' agreement or the decree as to her custody and visitations with the children, nor does she in her petition specifically complain that the father is not a fit and proper person to have the custody, but she alleges that she has remarried since the decree, is maintaining a home suitable for rearing the children, and that the best interests of the children would be served by granting her custody subject to reasonable visitation by the father. The answer of the father denied the petitioner had remarried, denied she was maintaining a suitable home for the rearing of the children, and denied it was for the best interests of the children to change their custody.

The mother, Mildred F. Israel, was the only witness at the original divorce trial; the witnesses at the hearing on this present petition to modify the decree were, for the petitioner, the mother herself, and, for the respondent, the father himself, Melissa Forster, the father's housekeeper, the petitioner (under Section 60 of the Civil Practice Act), Paul Serodske, a friend of the father and mother, and William Israel, the father's brother. We shall not set forth all the evidence, - some of which, on both sides, is irrelevant and some of which is of perhaps doubtful competency, - but will summarize sufficient thereof to give a fair statement of the material, relevant facts. Such of the evidence as we believe of doubtful competency we have ignored, and it is to be presumed such was also ignored by the Chancellor below. Further, the petitioner-appellant's errors relied upon for reversal in her brief do not preserve any points concerning rulings on the testimony and such are not specifically before us.

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It appears that the father is President of the Alco Screw and Mfg. Co.; he is unmarried; he lives in a four room flat, consisting of a bedroom, kitchen, dining room, and living room; he has an older lady, a Mrs. Forster, to take care of the children, do the ironing, and cook the meals. Mrs. Forster lives 5 or 6 doors away from the father's home. She takes care of the children from lunch time until after Mr. Israel comes home from work. The father and little girl sleep in the bedroom; the boy sleeps on a day bed in the dining room. It appears that the children's health is generally good, they are dressed reasonably well, one of them goes to grade school, attends regularly, and the other is in kindergarten. The little girl, according to the testimony on behalf of the father, had a bad cold one week and a doctor took care of her. It is admitted in her testimony by the petitioner that the father is good to the children, (but no better, she says, than she has been), and that "to a certain extent" he is a good father, and evidently he is a person of good character. The petitioner herself said at the original trial that she felt he would be a good person to raise the children, and at the hearing on this petition the petitioner said the purpose of the original custody arrangements was so the children would be raised in the same environment as before and as close to it as was possible. She also said the reason she had agreed the father should have custody was that he "had the children turned against her".

The petitioner, the mother, is about 40 years old; she remarried December 31, 1953, some 2½ months after the decree; her residence consists of a dining room, parlor, two bedrooms, kitchen, and bath; she owns a restaurant, where she is presently employed all day, but she says she intends to sell it and devote her time to caring for the children, if granted their custody; she says the children would each have their own beds if



she is granted their custody, although evidently both children would sleep in the same bedroom at her place. She says that the change of circumstances on which she asks a modification of the decree is that she was living in a home which was sold at the time of the decree, she has subsequently remarried, obtained quarters for the children, and established a home. The petitioner said that several times since the decree, when the children were with her, the little girl was inadequately clothed, (which is controverted by the respondent's evidence), that the little girl had had one cold after another all winter (which is also controverted by the respondent's evidence), and that she had never before been sick with colds.

The burden in cases of this type of proving a material change in circumstances since the divorce decree of October 19, 1953 and prior to the filing of the petition of November 4, 1954, which would affect the welfare and custody of the children, is upon the petitioner. We do not believe that the petitioner here has satisfied that burden.

The applicable statute, CH. 40, ILL. REV. STATS., 1953, par. 19, provides, so far as material:

"When a divorce shall be decreed, the court may make such order touching --- the care, custody, and support of the children, or any of them as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just. ----- The court may, on application, from time to time, make such alterations in -- the care, custody and support of the children, as shall appear reasonable and proper."

A divorce decree determining the custody of children is final and res judicata on the basis of the conditions then existing, and may not be modified, altered, or amended afterwards unless new material facts and circumstances have arisen since its entry which make it necessary for the welfare of the child or

1. The first part of the paper discusses the importance of the study of the history of the United States. It is argued that a knowledge of the past is essential for a full understanding of the present and for the development of a sound policy for the future. The author points out that the study of history is not only a means of satisfying our curiosity about the past, but also a means of training the mind and of developing the character. It is through the study of history that we learn the lessons of the past and are enabled to avoid the mistakes of our ancestors. The author also emphasizes the importance of the study of the history of the United States, particularly in the light of the fact that the United States is a young nation and is still in the process of developing its institutions and its character. It is through the study of the history of the United States that we learn the principles of democracy and the values of freedom and justice, and are enabled to apply these principles and values to the problems of the present and the future.

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3. The third part of the paper discusses the importance of the study of the history of the United States in the light of the fact that the United States is a young nation and is still in the process of developing its institutions and its character. It is through the study of the history of the United States that we learn the principles of democracy and the values of freedom and justice, and are enabled to apply these principles and values to the problems of the present and the future. The author points out that the study of history is not only a means of satisfying our curiosity about the past, but also a means of training the mind and of developing the character. It is through the study of history that we learn the lessons of the past and are enabled to avoid the mistakes of our ancestors. The author also emphasizes the importance of the study of the history of the United States, particularly in the light of the fact that the United States is a young nation and is still in the process of developing its institutions and its character. It is through the study of the history of the United States that we learn the principles of democracy and the values of freedom and justice, and are enabled to apply these principles and values to the problems of the present and the future.

children that the custody be changed; the welfare of the child is preeminently the thing to be considered; the mere fact that there may have been some change in some respects in some conditions is not sufficient in itself to warrant modification of such a decree unless those changed conditions affect the welfare of the child; changes in permanent custody should not be subject to spasmodic variation merely to follow fluctuations in the employment or residence status of one of the parties, - a mere showing of change in conditions of the party who does not have custody is not enough to warrant modification of custody in the absence of proof that the welfare of the child requires such modification: WADE v. WADE (1951) 345 Ill. App. 170; MAUPIN v. MAUPIN (1950) 339 Ill. App. 484; THOMAS v. THOMAS (1924) 233 Ill. App. 488; LINN v. LINN (1946) 329 Ill. App. 652 (abst.); FRENTRESS v. FRENTRESS (1947) 332 Ill. App. 283 (abst.); WICK v. WICK (1950) 341 Ill. App. 478 (abst.).

The petitioner particularly urges that the custody of children of tender years, especially girls, should be awarded to the mother. There is no arbitrary, absolute rule to that effect, though such might, abstractly, be somewhat persuasive, together with other material circumstances, as an original matter in determining the custody in the original decree, if there were a contest on that subject. But this case does not arise on the original decree. That decree, awarding the custody of these children to the present respondent father is final on the conditions then existing. This case is a petition to modify that decree, and the issue, fundamentally, is not the propriety of the original decree but whether there has been since the decree a material change in circumstances affecting the welfare of the children which make it necessary for the welfare of the children that the custody be changed and the decree be so modified. Furthermore,

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the evidence, including the petitioner's testimony, shows that the petitioner agreed to the original custody provisions in the decree and evidently considered it to be to the best interests of the children that the father have the original custody at the time of the decree, October 19, 1953, - there was no contest on that matter. There is no evidence, and no particular contention by the petitioner, that the respondent father has, in the interval of about a year since the decree, ceased to be a fit and proper person to have the custody, it being substantially admitted he was a fit and proper person at the time of the decree, and the decree, in effect, so finding. We believe she has shown nothing of a substantial, material change in circumstances since the decree and up to the time of her petition, a little over a year later, November 4, 1954, that affects the welfare of the children themselves and their custody.

Perhaps it might, theoretically, be more desirable for the 5 year old daughter not to have to sleep in the same bedroom with the father, although there is no particular evidence as to why, and we do not understand why the little girl's sleeping in the same bedroom with the boy, as would evidently be the case at petitioner's residence, is any particular improvement. But, in any event, that circumstance alone, particularly considering the daughter's age, does not appear to be too important at this time, and, in any event, such does not constitute a material change in circumstances since the decree or indicate that the Chancellor abused his discretion in refusing to modify the decree.

The petitioner refers us to NYE v. NYE (1952) 411 Ill. 408; DRAPER v. DRAPER (1873) 68 Ill. 17; MINER v. MINER (1849) 11 Ill. 43; WAY v. HARRIMAN (1888) 126 Ill. 132; COHN v. SCOTT (1907) 231 Ill. 556; PEOPLE ex rel. v. GADDIS (1926) 240 Ill. App.



508; GILLETTE v. BRYANT (1917) 203 Ill. App. 322; PEARSON v. PEARSON (1912) 179 Ill. App. 127; PEOPLE ex rel. v. HICKEY (1899) 86 Ill. App. 20; and MCINTOSH v. MCINTOSH (1949) 336 Ill. App. 393. We do not believe those cases at variance with our views here and their principles, as far as applicable, we have endeavored to apply here. Some of them do not involve subsequent petitions to modify a prior divorce decree as to its custody provisions but have to do with the original determination of custody in the original decree, (DRAPEK v. DRAPEK; MINER v. MINER; PEARSON v. PEARSON). In others, the facts and circumstances do not bear a close resemblance to the facts of the present case, (PEOPLE ex rel. v. GARDIS; GILLETTE v. BRYANT) - in fact, each case in this particular field depends so much on its particular facts that, aside from the fundamental principles to be applied, precedents in other cases are sometimes not too helpful, one way or the other. Some involved issues not at all presented here, (WAY v. HARRIMAN; PEOPLE ex rel v. HICKEY). In MYE v. MYE the original decree granted custody of a child alternately annually to the mother and father and the court held, on a petition of the father for sole custody, that there had been no subsequent change of conditions adversely affecting the child nor any proper determination of unfitness on the mother's part, and hence a modification in the decree made on the father's petition was an abuse of discretion. In COHN v. SCOTT the original decree gave custody of a child to the father, and the Appellate Court and Supreme Court held on a later petition of the mother for modification that there should be no modification and the best interests of the child required it to remain with the father. MCINTOSH v. MCINTOSH is an abstract decision and it cannot be determined simply from the syllabus whether it is in point or not.

308; OLIVER v. MURPHY (1917) 303 Ill. App. 323; FRANKLIN v.

FRANKSON (1918) 178 Ill. App. 187; FRANKSON ex rel. v. MURPHY

(1899) 82 Ill. App. 307 and FRANKSON v. MURPHY (1903) 323 Ill.

App. 308. We do not believe these cases are binding on this court.

views have been expressed, as they are applicable, we have not

devised to apply here. None of them do not involve independent

positions as regards a matter of law, but as to the question

provisions but as to the question of interpretation of the

body in the original decree. (FRANKSON v. MURPHY, 178 Ill. App. 187)

FRANKSON v. MURPHY, 178 Ill. App. 187. In that case, the court held

not that a decree rendered in the State of Illinois, which

(FRANKSON ex rel. v. MURPHY, 178 Ill. App. 187) - is binding, each

case in this particular field, and as such, the court held

facts here, since the court in the original decree, the court

precedents in other cases, we are not bound by them, and we

on the other, does involve issues that are not presented here.

(FRANKSON v. MURPHY, 178 Ill. App. 187). In that case, the court

original decree rendered in the State of Illinois, which

to the court and the court held that the court, in that case,

the law for sole custody, the court held that the court, in that

change of conditions arises from the fact that the court, in that

determination of custody of the mother's child, and as such,

modification in the court's order, and as such, the court held

issue of disposition. In FRANKSON v. MURPHY, the original decree was

custody of a child to the father, and the appellate court had

Supreme Court held on a later petition of the mother for modi-

fication that there should be no modification and the court

interest of the child required it to remain with the father.

FRANKSON v. MURPHY is an abstract decision and it cannot be de-

termined simply from the syllabus whether it is in point or not.

The Chancellor has a broad discretion in determining the custody of children in divorce cases and in passing on petitions to modify the decrees and change such custody, having, as he does, an opportunity to see the witnesses, test their credibility by observation, and weigh the evidence in the Court Room. We should not reverse the Chancellor's findings on the evidence unless such are against the manifest weight of the evidence: WADE v. WADE, supra. It is primarily the trial court's responsibility to determine the weight of the evidence and where its preponderance lies. The order here is not, we believe, against the manifest weight of the evidence, and the proposed alteration in custody sought by this petition cannot, under the statute, be said to have been established by the manifest weight of the evidence to be reasonable and proper under the circumstances.

The order is, therefore, affirmed.

AFFIRMED.

Dove P.J. Concurs  
Corraldi, - J. Concurs

The Chancellor has a broad discretion in determining

the custody of children in divorce cases and in partition

as he feels, an opportunity to see the witnesses, and to

credibility of the evidence, and to weigh the evidence in the

From. We should not reverse the Chancellor's findings on the

evidence unless such error is shown to be of such weight as to

evidence: WILLIAMS v. WILLIAMS, 20 N. D. 111, 112 N. D. 111.

court's responsibility to determine the weight of the evidence

and where it is shown that the Chancellor's findings are

believe, and that the weight of the evidence is in favor of

proposed alternative is usually controlling in such cases.

under the rule, we are to have a reversal only if the

test weight of the evidence is in favor of the appellant.

the circumstances.

The order is affirmed, with costs.

WILLIAMS v. WILLIAMS

Done at Grand Forks, N. D., this 1st day of June, 1911.  
J. H. [Signature]  
J. H. [Signature]

395 A  
46690

EDWARD ZIMBON,

Appellant,

v.

1400 LAKE SHORE DRIVE CORPORATION,  
LOUIS G. TAUPIN, JESSIE JACKSON  
and ELMER A. CLAAR & CO., a cor-  
poration,

Appellees.

1 8 I.A.<sup>2d</sup> 554  
APPEAL FROM

CIRCUIT COURT,

COOK COUNTY

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF  
THE COURT.

This is a suit against defendants for malicious prosecution and false imprisonment. Plaintiff having filed five amended or supplemental complaints, the court offered him an opportunity to still further amend his pleadings; he elected, however, to stand on the fifth amended or supplemental complaint, and a final order of dismissal was entered, from which he appeals.

The fifth amended and supplemental complaint alleges in substance that plaintiff walked into the lobby of the apartment building known as 1400 Lake Shore Drive at about ten o'clock of the evening of March 27, 1951 and told the desk clerk, Jessie Jackson, one of the defendants, that he wanted to see the manager. The only other persons present in the lobby at the time of plaintiff's entrance were a scrubwoman, a telephone operator and a housekeeper, but shortly thereafter two police officers arrived who interrogated and searched plaintiff. The desk clerk explained to plaintiff that a hold-up had occurred in the building three weeks earlier, and that her instructions were to call the

The first of these is the fact that the  
 government has been unable to raise the  
 necessary funds to meet its obligations.  
 This is due to a number of factors, including  
 the fact that the government has been unable to  
 collect the necessary taxes, and the fact that  
 the government has been unable to borrow the  
 necessary funds from the international market.  
 The second factor is the fact that the  
 government has been unable to implement the  
 necessary reforms to the economy. This has  
 led to a number of problems, including  
 inflation, unemployment, and a general  
 decline in the standard of living. The third  
 factor is the fact that the government has  
 been unable to maintain a stable political  
 environment. This has led to a number of  
 problems, including corruption, and a  
 general lack of confidence in the government.  
 The fourth factor is the fact that the  
 government has been unable to maintain a  
 stable social environment. This has led to  
 a number of problems, including social  
 unrest, and a general lack of confidence in  
 the government. The fifth factor is the fact  
 that the government has been unable to  
 maintain a stable economic environment. This  
 has led to a number of problems, including  
 inflation, unemployment, and a general  
 decline in the standard of living. The sixth  
 factor is the fact that the government has  
 been unable to maintain a stable political  
 environment. This has led to a number of  
 problems, including corruption, and a  
 general lack of confidence in the government.  
 The seventh factor is the fact that the  
 government has been unable to maintain a  
 stable social environment. This has led to  
 a number of problems, including social  
 unrest, and a general lack of confidence in  
 the government. The eighth factor is the  
 fact that the government has been unable to  
 maintain a stable economic environment. This  
 has led to a number of problems, including  
 inflation, unemployment, and a general  
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 factor is the fact that the government has  
 been unable to maintain a stable political  
 environment. This has led to a number of  
 problems, including corruption, and a  
 general lack of confidence in the government.  
 The tenth factor is the fact that the  
 government has been unable to maintain a  
 stable social environment. This has led to  
 a number of problems, including social  
 unrest, and a general lack of confidence in  
 the government.



police if anything unusual occurred; at plaintiff's unexplained demand, at ten o'clock in the evening, to see the manager, she had instructed the telephone operator to call the police. After the police arrived plaintiff indicated that he wanted to rent an apartment in the building, and again demanded to see the manager. Although the desk clerk advised him that there were no vacancies and that there was accordingly no reason to call the manager, he still persisted in his demand. Shortly thereafter Louis Taupin, another of the defendants, arrived on the scene and told plaintiff that he was the manager. Jessie Jackson having complained to Taupin that plaintiff had been abusive and insulting to her, Taupin signed a complaint charging plaintiff with a breach of the peace. He was arrested, released on ten-dollar bond, and was acquitted when the complaint came on for trial.

Defendants' motion to strike the amended complaint was based on three grounds, namely, that the complaint showed that: (1) defendant Jessie Jackson, the desk clerk, did not prosecute plaintiff; (2) defendants did not act maliciously or without probable cause; and (3) under the circumstances of this case, a corporate defendant is not bound by, or liable because of, any acts on the part of its individual employees.

As to the first of these contentions, Jessie Jackson seeks to avoid liability for the reason that she did not sign the complaint. The manager signed it, charging disorderly conduct, because of her false accusation, and also for the protection of his employer from the possible

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1.  $\frac{1}{2}$  2.  $\frac{1}{2}$  3.  $\frac{1}{2}$  4.  $\frac{1}{2}$  5.  $\frac{1}{2}$  6.  $\frac{1}{2}$  7.  $\frac{1}{2}$  8.  $\frac{1}{2}$  9.  $\frac{1}{2}$  10.  $\frac{1}{2}$

1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Lichtenthaler and Sponholz (1980). The total chlorophyll content was determined by the method of Arar and Cook (1981).

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[illegible][illegible]

*Synonymy*

Age Group	Percentage of Respondents
18-29	~65%
30-49	~75%
50-69	~80%
70+	~85%

1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Arar and Collins (1971).

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1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Arar and Collins (1971).

Time of day (h)	Sleeping (%)	Resting (%)	Standing (%)	Walking (%)	Running (%)
0	40	10	5	2	1
3	35	15	10	3	1
6	30	20	15	5	2
9	25	25	15	10	5
12	20	25	15	10	5
15	15	20	10	5	2
18	10	15	5	2	1
21	5	10	2	1	1
24	35	10	5	2	1

Trial	Control	MCI	AD
1	95	85	75
2	90	80	70
3	88	78	68
4	86	76	66
5	85	75	65

[illegible]

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technical liability arising out of the searching and interrogation of plaintiff by the police. It was held in the early case of Gilbert v. Emmons, 42 Ill. 143, that in an action for malicious prosecution or false arrest, the party charged must appear to be a proximate and efficient cause of putting the law in motion. In that case the judgment against a co-partner was reversed on the ground that his knowledge of and passive consent to the activities of his partner did not amount to advice and cooperation. However, in a recent case, Aldridge v. Fox, 348 Ill. App. 96, it was claimed that the false imprisonment of plaintiff was not brought about by the defendant manager. It there appeared that the manager, by means of a pretext, induced plaintiff to remain in the store, and upon the arrival of the police pointed him out and said, "There is your man." In refusing to set aside the judgment, the court made the following pertinent observations: "It is admitted that Fox [one of the defendants] was in charge of the appliance department from which the radios were missed about a month before plaintiff's arrest, and that after he reported the alleged theft it was arranged between the Chicago Heights' police department and Wards for the latter to call the police department if and when a request was made by any 'suspicious' one for a cord to fit this type radio. That Fox was a party to this arrangement is indicated from his actions leading up to plaintiff's arrest. Under the circumstances we think it clear that Fox, acting for Wards, caused plaintiff's arrest. Having concluded that plaintiff was arrested as a result of Fox's activity and that Wards is consequently liable on the theory of

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respondeat superior, it becomes unnecessary to consider the participation of any other of Wards' employees in plaintiff's arrest." It was likewise held in Conroy v. Townsend, 69 Ill. App. 61, an early decision, that two persons may be jointly liable for malicious prosecution where they joined in charging the plaintiff with a crime although only one of them signed the complaint.

As the second ground for dismissal of the amended complaint, it is contended that defendants did not act maliciously or without probable cause. However, it appears from the complaint that without cause plaintiff was subjected to search and interrogation by the police and that Miss Jackson apologized for having caused the police to be called, stating that she had followed the express instruction of her employer. It further appears that when the manager Taupin arrived, Miss Jackson, without cause or provocation, charged plaintiff with disorderly conduct, and the manager stated that "for the protection of his employer" he desired to prefer that charge as a basis for plaintiff's arrest. It is well settled that material facts in a complaint are admitted on motion to strike; accordingly malice or lack of probable cause would be questions of fact to be determined upon a hearing.

The third ground urged for dismissal of the complaint is that the employers here are not bound by or liable because of any actions of the manager or desk clerk. This contention was considered by the court in King v. Automobile Bonding Co., 283 Ill. App. 107, wherein plaintiff charged

$$\frac{\partial}{\partial t} \left( \frac{1}{\rho} \right) + \frac{\partial}{\partial x} \left( \frac{1}{\rho} u \right) + \frac{\partial}{\partial y} \left( \frac{1}{\rho} v \right) + \frac{\partial}{\partial z} \left( \frac{1}{\rho} w \right) = 0$$
[illegible]

10. *Chrysomelidae* (10 spp.)

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1. *Chlorophyll a* (Chl *a*)

1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Arar and Collins (1971).

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<sup>a</sup> Values are means ± SD.

Figure 1. The effect of the concentration of the  $\text{H}_2\text{O}_2$  solution on the amount of the released  $\text{H}_2\text{O}_2$  from the  $\text{H}_2\text{O}_2$ -loaded hydrogel. The amount of the released  $\text{H}_2\text{O}_2$  was measured by the amount of the released  $\text{H}_2\text{O}_2$  from the  $\text{H}_2\text{O}_2$ -loaded hydrogel. The amount of the released  $\text{H}_2\text{O}_2$  was measured by the amount of the released  $\text{H}_2\text{O}_2$  from the  $\text{H}_2\text{O}_2$ -loaded hydrogel.

1. *Chlorophyll a* (Chl *a*) and *Chlorophyll b* (Chl *b*) were determined by the method of Lichtenthal and Whistler (1973). The total chlorophyll content was determined by the method of Arar and Cook (1977). The carotenoid content was determined by the method of Lichtenthal and Whistler (1973). The total carotenoid content was determined by the method of Arar and Cook (1977). The total protein content was determined by the method of Lowry et al. (1951). The total lipid content was determined by the method of Bligh and Dyer (1959). The total carbohydrate content was determined by the method of Dubois and Gilles (1950). The total nucleic acid content was determined by the method of Burton (1956). The total ash content was determined by the method of AOAC (1970). The total water-soluble carbohydrate content was determined by the method of Dubois and Gilles (1950). The total water-soluble protein content was determined by the method of Lowry et al. (1951). The total water-soluble lipid content was determined by the method of Bligh and Dyer (1959). The total water-soluble nucleic acid content was determined by the method of Burton (1956). The total water-soluble ash content was determined by the method of AOAC (1970).

-5-

that the person hired by defendant to repossess automobiles had falsely charged him with the crime of concealing and disposing of an automobile without the consent of the mortgagee. A directed verdict for the employer was held to be reversible error, it being a jury question to determine whether the agent had implied authority to cause the plaintiff's arrest. See also Carlberg v. Spiegel's House Furnishing Co., 178 Ill. App. 424, and Neeson v. Lake View Dairy Co., 285 Ill. App. 36, the latter holding that whether an individual in a malicious prosecution action has acted in behalf of the corporation is a question for the jury.

We are satisfied that the allegations of the complaint were sufficient to establish a prima facie case against all the defendants, who should have been required to answer, and the case submitted to the court or jury for trial on the merits. Accordingly, the order dismissing the amended complaint is reversed and the cause remanded with directions that defendants be required to file their respective answers and that the cause proceed to trial on the merits.

ORDER REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

BURKE AND NIEMEYER, JJ., CONCUR.





46693

PETER C. FORNEY,

Appellee,

v.

MICHAEL LA SUSA and ANNA  
LA SUSA,

Appellants.

APPEAL FROM

COUNTY COURT

COOK COUNTY

8 I.A. 535

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendants, husband and wife, appeal from a judgment for \$1,660 entered in plaintiff's action for a commission in procuring a purchaser alleged to be ready, willing and able to buy defendants' 8-apartment building in Chicago on terms fixed by defendants.

The case was tried by the court without a jury. Defendants contend that there was no agreement, express or implied, by which they became obligated to pay a commission; that the persons offered by plaintiff as purchasers are not shown to have been ready and able to make the purchase; that the contract tendered to defendants is not in accordance with the terms of sale prescribed by defendants.

The plaintiff testified that during 1953, 1954, and many years prior thereto he was a licensed real estate broker; on March 9, 1953 he first met defendants at their apartment, where he talked to the husband (hereinafter called Michael) in the presence of Mrs. La SUSA. Introducing himself to Michael he said, "I am a real estate broker. I have people looking to purchase properties in this section of town



-2-

known as Altodina Terrace. Do you think you would like to sell your building?" Michael said, "I might sell if I get my price." I asked him, "What is your price?" and he said, "I would take \$65,000 net if I get \*\*\* If I get a one-year lease on my apartment." Sometime in April plaintiff showed the property from the outside to a prospect and received an offer which he did not submit to defendants. In the latter part of April his associate Mr. Cleary showed the premises to a prospective purchaser by the name of Shyder after an appointment had been made with Mrs. La Susa, but no offer was made to purchase the property. Plaintiff next showed it to the Fisks after an appointment with Mrs. La Susa. On May 14, 1953 the Fisks signed a contract to purchase the property for \$66,660 and to give defendants a lease on the first-floor apartment at 2544 West Hollywood Avenue in the premises for a period of one year from the date of sale. Plaintiff went to defendants' home with the contract and a check of the prospective purchasers for \$2,500 earnest money. He told defendants he had a contract for \$66,660. Michael replied, "I no want listen to you." "I don't want to sell." The following Sunday he went to plaintiff's office where he repeated his refusal to sell, and denied he owed plaintiff a commission.

As the court found for plaintiff we must assume that he accepted plaintiff's testimony and rejected any contradictory testimony of the defendants. Plaintiff contends that his talk with defendants on March 9th, coupled with the giving



of information as to rents, total yearly income and taxes of the premises and permitting the showing of the premises to prospective purchasers by plaintiff, creates a contract by defendants to pay a commission.

There was no express contract for the employment of plaintiff to sell defendants' property, and no mention of a commission to be paid until the rejection of the tendered contract after May 14th. On March 9th plaintiff introduced himself as a real estate broker who had people looking to purchase property in the neighborhood. He asked defendants if they would like to sell their property. When told by Michael that he might sell if he got his price, he asked for the price. Although he was a real estate broker of many years experience, he said nothing about selling the property for defendants or the payment of a commission to him on the sale. He had had no previous dealings with defendants, and their experience and knowledge of real estate transactions handled by a broker, if any, is not shown. No contract to pay a commission was entered into on March 9th. Jahn v. Kelly, 58 Ill. App. 570; Morton v. Barney, 140 Ill. App. 333; Bunn v. Smith, 190 Ill. App. 530.

The plain import of plaintiff's testimony is that he was acting on behalf of his clients, looking to purchase properties in the neighborhood of defendants' building. The giving of information as to the income and taxes of the property, and showing it at plaintiff's request, did not create an implied agency authorizing plaintiff to act for defendants in selling the property. In the comparatively



recent case of Whiston v. David Mayer Bldg. Corp., 337 Ill. App. 67, the broker, representing a client who was **looking for office** space in the Chicago Loop, communicated with the defendant by telephone, asking to represent it in leasing certain space and for the privilege of bringing the prospective tenant to the office of defendant for a conference. This conference was held, the terms of the tenancy discussed--the broker participating in the discussion, but no express agreement was made that plaintiff represent the defendant in the transaction. Subsequently the prospective tenant introduced by plaintiff, and the defendant, entered into a 19-year lease. Plaintiff sued for a commission and recovered judgment in the trial court, which was reversed on appeal, the reviewing court holding that the permission to bring the prospective tenant to defendant's office did not give rise to a contract of brokerage.

This conclusion makes the consideration of defendants' other contentions unnecessary. However, it might be added that the readiness and ability of the prospective purchasers to buy the building for cash is not shown. Fisk's conclusion that they had \$50,000 in cash was not supported by his testimony on cross-examination. His testimony that he would not take less than \$100,000 for a rooming house bought in 1943 for \$18,000 and still used for the same purpose, is not supported by any facts tending to show the marvelous increase in value of the property to \$100,000.

The judgment is reversed.

REVERSED.

1998



397 A

46067

LEE ROY KAHN, a minor, by JULIUS  
F. KAHN, his father and next friend,

Appellee,

v.

JAMES BURTON COMPANY, a corporation,  
JACOB A. KRIEGER and BESSIE KRIEGER,  
and MALKOV LUMBER COMPANY, INC., a  
corporation,

Defendants.

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MALKOV LUMBER COMPANY, INC., a cor-  
poration

Appellant,

JAMES BURTON COMPANY, a corporation,  
Co-Party Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

8 I.A.<sup>2d</sup> 556

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Lee Roy Kahn, a minor, sued Jacob A. Krieger and Bessie Krieger, called the owners, James Burton Company, called the contractor, and Malkov Lumber Company, Inc., called the supplier, for injuries suffered on July 20, 1948, while on a lot in Chicago owned by the Kriegers, on which a two story house was being constructed by the contractor. The trial judge directed a verdict in favor of the owners and there is no contention that the court erred in so doing. Plaintiff was injured when a pile of lumber, delivered the previous day by the supplier and upon which he (plaintiff) had been playing, toppled over and some boards of the pile fell on him. The jury found the corporate defendants guilty and assessed damages at \$20,000. Motions for a directed verdict,

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Another reason

1. *Chlorophyll a* (Chl *a*)

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for judgment notwithstanding the verdict and for a new trial were overruled. From the judgment entered on the verdict these defendants appealed. We held as a matter of law that the supplier was not guilty of any negligence, that the pile of lumber was not a dangerous instrumentality and that the contractor was not guilty of negligence and reversed the judgment with directions to enter judgment for the defendants. (1 Ill. App. 2d. 370). The Supreme Court, having granted a petition for leave to appeal, held that we erred, reversed the judgment entered here and remanded the cause with directions to consider the undecided contentions and to affirm the judgment of the Superior Court or reverse the judgment and remand the cause. (5 Ill. 2d. 614). It is unnecessary to restate the facts given in the previous opinions.

Defendants say that plaintiff was guilty of contributory negligence as a matter of law. In Maskaliunas v. C. & W. I. R.R. Co., 318 Ill. 142, the court said (150):

"The law is clearly established by great weight of authority, that between the ages of seven and fourteen the question of culpability of the child is an open question of fact and must be left to the jury to determine, taking into consideration the age, capacity, intelligence and experience of the child."

We find that under the evidence in this case the question of whether plaintiff, an 11 year old boy, was in the exercise of due care for his own safety, was for the jury to decide.

Defendants maintain that the verdict is against the manifest weight of the evidence. There is little dispute about the facts. We cannot say that the judgment is against the manifest weight of the evidence.

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1. The first of the three main parts of the book is devoted to a general survey of the history of the world from the beginning of the world to the present time. The second part is devoted to a detailed description of the various countries of the world, and the third part is devoted to a description of the various peoples of the world. The book is written in a simple and clear style, and is suitable for use as a text-book in schools and colleges.

2. The book is divided into three main parts. The first part is devoted to a general survey of the history of the world from the beginning of the world to the present time. The second part is devoted to a detailed description of the various countries of the world, and the third part is devoted to a description of the various peoples of the world. The book is written in a simple and clear style, and is suitable for use as a text-book in schools and colleges.

3. The book is divided into three main parts. The first part is devoted to a general survey of the history of the world from the beginning of the world to the present time. The second part is devoted to a detailed description of the various countries of the world, and the third part is devoted to a description of the various peoples of the world. The book is written in a simple and clear style, and is suitable for use as a text-book in schools and colleges.

The supplier asserts that the court erred in giving to the jury, of its own motion, Instruction 11, pointing out that this instruction covers almost four pages of the printed abstract, recounts, almost verbatim, the allegations of the complaint and the answers, and concludes by telling the jury that the complaint and answers are unsworn statements and that "they neither proved nor attempted to prove any of the allegations or denials contained therein." This defendant says that the instruction could not serve a useful purpose and that it is misleading and confusing. This defendant states that this instruction and Instruction 13 attempt to define the doctrine of attractive nuisance in general terms, and that neither of these instructions told the jury that the doctrine could not be invoked against the supplier. This defendant, pointing out that other instructions told the jury that the complaint did not charge the supplier with maintaining an attractive nuisance and that this defendant could not raise the defense that plaintiff was a trespasser, inquires as to which instruction the jury was to follow. We cannot say that Instruction 11 is subject to the criticism leveled at the instruction in Signa v. Alluri, 351 Ill. App. 11. Under the law of the case pertaining to the liability of these defendants, we are satisfied that they were not harmed by the giving of Instruction 11.

Both defendants say that the court erred in giving Instructions 12 and 13. In view of the holding of the Supreme Court concerning the law applicable to the facts of the case, we conclude that the defendants were not harmed

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by the giving of these instructions. The court did not err in refusing cautionary Instruction 5 and in giving cautionary Instruction 9, nor did the court err in giving plaintiff's Instructions 23, 25 and 32.

Finally, the supplier asserts that the verdict in the sum of \$20,000 is grossly excessive. At the scene of the mishap it was observed that plaintiff's nose was skinned and that the boards had scratched his back. He was taken to a hospital and given first aid. At the hospital it was noted that a continuous series of six <sup>red</sup> to eight welts had appeared on his back, from the top of the head to the base of the spine, and the skin was broken and bleeding in several places. His skull was bruised, his right forearm and upper arm were badly bruised and black and blue, and his lips were lacerated. He was returned to his home in the police squad car. He walked from the hospital to the squad car and was helped by his father from the car into his house. He was put to bed at once and examined by Dr. Charles O. Shallat a half hour later, who found his back badly bruised and swollen. Plaintiff was then having severe pain in his back, neck and around his head and the whole back region then showed bruises from the lumbar region up to his neck, and there were bruises around the forehead, nose, right arm and shoulder. He could move his limbs but complained of severe pain in his lower back in certain positions. He was given a sedative, quiet and ice packs to his back were prescribed and the next two days he remained in bed. He was very stiff and could not walk





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and meals were brought to him in bed. He was then taken by ambulance to another hospital, examined and X-rayed. A diagnosis was made of a compression fracture of the fifth lumbar vertebra and he remained in that hospital from July 22 to July 25.

Dr. Shallat called in Dr. Al Wendt, Jr., and a body cast was applied from the neck to the hip line. Dr. Shallat then called in Dr. Philip Lewin and his associate, Dr. Scheman. These physicians were on the staff at Michael Reese Hospital and at their request plaintiff was transported by ambulance to that hospital. Dr. Shallat continued to see the patient at the hospital. There the body cast was removed and a different type of cast, more rigid and complete, was put on. With that cast on he could not walk or move his legs or get around. It remained on from the end of July for a period of six weeks. After several days he was brought home by ambulance, but was flat on his back. He returned to the hospital by ambulance two or three times with the cast still on. The cast was taken off just before school opened in September and a brace applied almost immediately. After the removal of the cast, physiotherapy treatments were given as prescribed by the doctor and these ran for four or five months under the supervision of a physiotherapist. Dr. Lewin found a compression fracture of the fifth lumbar vertebra in which the vertebral body was compressed about 40% of its normal height. There was damage to the intervertebral disks above and below the fifth lumbar vertebra because of the degree of compression. The disks are



intimately connected with the vertebra, especially in a child; the disks are really part of the vertebra in a child, and the damage to these disks is chiefly compression and possibly some torsion or twisting. Films taken three years after the accident showed a little curvature of the spine which could develop in that time following a compression fracture.

Plaintiff wore the brace all of the first year and slept with it on; then he began to take it off when he went to sleep. He wore it all through the day from then until the time of the trial and pursuant to Dr. Lewin's instruction is to continue to wear it for several years for protection and support until the growth period comes to an end. Without the brace, plaintiff has trouble. His back hurts once in a while and he gets tired quickly. He is still under the care of Dr. Lewin and Dr. Shallat, the latter seeing him once every two months. He should be under the observation of a person trained in orthopedics indefinitely and should report any unusual signs or symptoms such as pain, weakness and stiffness. The back had not recovered its normal condition at the time of trial and the bones are more vulnerable than bones that have reached full growth. The vertebral body was still narrowed. Before the occurrence he played baseball, football and other games. Since the accident he has not played football, baseball or basketball, nor has he been permitted to engage in any running or jumping games for the last four years. He is

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restrained from doing any active play or lifting or stretching. He is allowed to swim and removes the brace to do that. The fifth lumbar vertebra is young and growing and is therefore vulnerable and more susceptible to injury and disease. The prognosis must be guarded; "you cannot give that vertebra a clean bill of health; it is not as good as new." The condition of plaintiff's back over a period of years as he reaches and grows into maturity, as far as it being vulnerable to injury or disease, is "problematical and prophetic to say." Dr. Lewin testified that the healing process "it is under-going is good up to date" and that "assuming there are no further complications such as disease or injury, it is my thought and belief that eventually upon reaching manhood he will have a good back." The question of damages is **peculiarly** one of fact for the jury and where the jury has been correctly instructed upon the measure of damages and it is not claimed or shown that the size of the verdict clearly indicates it was the result of prejudice or passion on the part of the jury, the award should not be disturbed upon review. Ford v. Friel, 330 Ill. App. 136, 140. Under the record we do not feel that we should disturb the award of damages made by the jury.

For the reasons stated the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

FRIEND, P. J., and NIEMEYER, J., CONCUR.

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JAMES GERAGHTY,

Appellee,

v.

BURR OAK LANCES, INC., a corporation,

Appellant

8 I.A.<sup>2d</sup> 557

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In an action for personal injuries suffered because of the alleged negligence of the defendant in the construction and maintenance of a motor vehicle parking lot operated in connection with the latter's business in conducting bowling alleys, the court entered judgment against the defendant for \$28,000. We reversed the judgment and remanded the cause with directions to enter judgment for the defendant and against the plaintiff notwithstanding the verdict, (2 Ill. App. 2d 48) holding as a proposition of law that the proximate cause of plaintiff's injuries was his contributory negligence, and that a verdict should have been directed. On leave granted plaintiff to appeal the Supreme Court reversed the judgment and remanded the cause with directions to consider the errors, if any, other than the one decided by that court, and to affirm the judgment of the trial court or to remand the cause for a new trial. (5 Ill. 2d 153).

As the opinions summarize the evidence it is unnecessary for us to do so here. Defendant argues that





considering all of the evidence in the light most favorable to the plaintiff, together with all inferences which may reasonably be drawn therefrom and with all controverted questions of fact resolved in his favor, he failed to prove that defendant did not exercise reasonable care and caution in the construction of its parking lot, and also failed to prove defendant guilty of the negligence charged in the maintenance thereof. A careful reading of the transcript of the testimony and of the opinion of the Supreme Court brings us to a finding that the court was right in submitting the issue of defendant's negligence to the jury as a question of fact. We cannot agree with defendant's contention that the judgment is contrary to the manifest weight of the evidence. We are of the opinion that there is ample credible evidence to sustain the judgment.

We turn to defendant's contention that the court committed reversible error in giving an instruction which required the jury to assess damages upon proof less than a preponderance of the evidence. The instruction is not peremptory in form and does not direct the jury to find for the plaintiff. It tells the jury the elements of plaintiff's damages which they should consider if they find for him. Other instructions told the jury that the plaintiff had to prove his case by a preponderance of the evidence before he could recover, and that before he could recover he had to prove that all of his alleged injuries and state of ill-health were caused solely and proximately



by the accident, and that the burden of proving his injuries and subsequent ill-health rested solely on plaintiff. The court did not err in giving the instruction.

Defendant complains of the giving of instruction 18. This instruction told the jury that plaintiff in his complaint and amendment thereto charged that the defendant "negligently did one or more of the following acts" which were the proximate cause of the injuries sustained by the plaintiff. The instruction then set out six charges of negligence in subparagraphs A to F inclusive. It informed the jury that the "foregoing" are the allegations of the complaint and amendment and are denied by defendant in his answer and that the answer further denies that plaintiff was in the exercise of ordinary care for his own safety or that he was an invitee, and concludes by saying that if the jury finds from a preponderance of the evidence and under the instructions of the court that the injuries, if any, were proximately caused by one or more of the "foregoing" acts and that the alleged conduct constituted negligence on the part of the defendant, and that prior to and at the time of the incident the plaintiff was an invitee and was in the exercise of due care and caution for his own safety, then in such case the jury should find the defendant guilty.

Defendant maintains that the instruction is erroneous in that it is a peremptory instruction and directs a verdict of guilty on proof that under subparagraph A it negligently maintained its parking lot. Defendant states that under<sup>the</sup> instruction the jury is allowed to ignore the

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remaining charges of negligence made under subparagraphs B to F, inclusive, and supply any conceivable act of misconduct on behalf of the defendant, whether legally negligent or not, that might enter the minds of the jurors without any limitation by the pleading, and states further that the remaining charges of negligence in the instruction from B to E, inclusive, are not supported by evidence. In our opinion the instruction summarizes the pleadings and is not vulnerable to the criticism leveled at the instruction in Signa v. Alluri, 351 Ill. App. 11. It is error to give an instruction telling the jury that if a certain fact exists a certain verdict is to be returned, if there is no evidence of the fact. Such instructions must be based upon the evidence in the case, and a statement of a hypothesis of fact virtually tells the jury that there is evidence from which they may believe in the existence of the fact, and if there is no evidence the instruction is misleading. Schlauder v. Chicago & Southern Traction Co., 253 Ill. 154, 162. Defendant recognizes that it was not necessary to a recovery that the defendant be found guilty of all the acts of negligence charged. We are satisfied that there was competent evidence from which the jury had the right to find that the mishap was proximately caused by one or more of the acts charged. The jurors were not allowed to speculate on any other charges than those stated in the instruction. There was competent evidence to support all of the acts of negligence charged. It will be noted that the defendant joined in the issues of fact by filing its answer. We are of the opinion that the allegation of subparagraph A that the



defendant negligently maintained its parking lot is a valid pleading and that there is proof to sustain the charge. In Church v. Adler, 350 Ill. App. 471, in disposing of the contention that the words "negligently and carelessly" are mere legal conclusions and not allegations of fact, the court said (480): "Whatever the earlier law in this State may have been (see Chicago, B. & Q. R. Co. v. Harwood, 90 Ill. 425, 426, 427), it has been settled since Chicago City Ry. Co. v. Jennings, 157 Ill. 274, that an allegation of general negligence is sufficient." We do not think that the court erred in giving this instruction. In the recent case of Sims v. Chicago Transit Authority, 7 Ill. App. 2d 21, the court said (28):

"Generally, presumptions upon review favor judgment, and the burden is upon the appellant to point out the errors, if any, calling for its reversal. 222 East Chestnut St. Corp. v. Murphy, 325 Ill. App. 392, 399. There is a presumption that a general verdict under several counts or issues, some of which are good and some bad or unsupported by any evidence, is based on the evidence supporting the good counts or issues."

See Schlauder v. Chicago & Southern Traction Co., 253 Ill. 154, 162.

Dr. Howard W. Schneider testified for the plaintiff as an orthopedic surgeon who was called by the attending physician to operate on the plaintiff. When asked to give an opinion based upon a reasonable degree of certainty as to what effect the surgery he performed on plaintiff's arm "will have, <sup>on</sup> the mobility of his arm," he was allowed to testify over the objection of the defendant that he had an opinion and stated that the external rotation in motion of the

1. The first part of the document is a list of names and addresses, which appears to be a directory or a list of contacts. The names are written in a cursive script, and the addresses are listed below them. The list includes names such as "John A. Smith", "Mrs. J. B. Jones", and "Mr. C. D. Brown".



arm "is going to be limited" and that "that is the purpose of the operation, to prevent this defect from coming around where it crosses the anterior edge and allows it to slip out." He testified that the purpose of the operation was to limit the motion of the arm and that it is permanently limited to somewhere below 30 degrees on external rotation. He stated further that the full range of the arm is "approximately 90 degrees in full external rotation and I hope that he comes up around forty five." He stated that plaintiff will have a limitation of external rotation to - "I hope it is to thirty degrees because if it goes much further it will dislocate again. I purposely want to prevent it from going out."

Defendant argues that the foregoing testimony was erroneously admitted and was prejudicial to the defendant in that the testimony was direct and positive in character despite the fact that it could only be based on subjective findings, all of which were under the control of the patient; that the testimony invaded the prerogative of the jury and in effect, substituted the doctor in place of the jury; and that it embodied the conclusions of the doctor and in view of subsequent testimony of the same witness, proved to be speculative and uncertain. We think that the doctor's testimony was based on a reasonable degree of medical certainty. He testified about the treatment he had given to plaintiff to prevent dislocation. He restricted the shoulder movability from a functional point of view and testified to the degree he had impeded the shoulder motion.

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The testimony was <sup>not</sup> based on subjective findings. The shoulder movability was impeded by the sewing of the muscles over the joint. The doctor testified to the successful outcome of the operation and the accomplishment of his purpose. His testimony did not invade the province of the jury. He was an expert. He knew the purpose of the operation and was able to reveal the outcome. He testified to statements of fact. In testifying about the limited motion in the arm resulting from the operation, he revealed the results obtained. When he testified that he had reduced the external rotation of plaintiff's arm to 30 degrees out of a possible 90 degree range of motion in the normal arm, he was testifying to a statement of fact and not to a conclusion. He stated positively that if plaintiff had a greater than 30 degree motion out of a full 90 degree motion in the arm, the arm would redislocate. He hoped that the sewing of the muscles would so restrict the motion of the arm that plaintiff could not get over 30 degree motion in the arm to keep it from redislocating. This was not speculative testimony, but positive testimony of the condition of the arm caused by the operation and the total extent of the improvement which might occur. A hypothetical question was not necessary because no question was raised as to the causal connection between the mishap and plaintiff's subsequent condition of ill-being. The operating physician was in the best position to give his opinion as to the movability of the arm based upon the operation which he had performed and the result which he had accomplished. We have read the cases cited



by defendant in support of its position that the court erred in admitting the testimony of Dr. Schneider to which it objected, but do not think they are applicable to the factual situation of the case at bar. We conclude that the court did not err in overruling defendant's objections to the testimony of Dr. Schneider.

A witness for the defendant, Svehd Berg, testified that he constructed the parking lot for the defendant just prior to the opening of the bowling alleys, that he started the alleys in 1946 and was the manager there until February, 1952. He was asked the following question: "During the time you operated those premises did anyone complain, or was it brought to your attention in any manner that any person outside of Mr. Geraghty was injured on that parking lot?" The attorney for plaintiff interjected: "Object to that, if the court please." The court sustained the objection. The witness was then asked: "November, 1946 until February of 1952, was any person injured on your parking lot, to your knowledge?" The attorney for plaintiff said: "Object." The court sustained the objection. However, the witness answered, "No, sir." The attorney for plaintiff stated: "My only purpose was to show whether or not there was any notice. Your Honor has ruled, so I shan't pursue." The attorney for defendant then inquired of the witness: "Mr. Berg, during the time you operated the bowling alleys and the parking lot, were there any complaints about the logs or railroad ties that were present in the parking lot?" The attorney for plaintiff said: "Object to that." The court



sustained the objection. Defendant insists that the testimony was admissible inasmuch as defendant was charged in the complaint with negligent construction of the parking lot by placing poles and ties on the surface thereof, citing Campion v. Chicago Landscape Co., 295 Ill. App. 225, where the court said (237):

"In the case at bar defendant offered to prove that there had been no previous accidents on this course for the purpose of showing that it had no knowledge of inherent danger, but the court denied the offer, notwithstanding the settled rule that where the dangerousness of a condition or place is alleged to be the cause of the accident other accidents occurring at that place under substantially the same conditions may be shown for the purpose of proving defendant's knowledge of the danger, and the corollary of this rule that proof of no other accidents may be shown for the purpose of showing defendant's lack of knowledge. (Wolczek v. Public Service Co., 342 Ill. 482.)"

Under the holding in the Campion case it was incumbent on the defendant to prove that the condition of the parking lot during the period covered was substantially the same as on the night of plaintiff's fall. No proof that the conditions were substantially the same was made or offered by the defendant. There was no proof that during the entire period the pole and railroad tie rested at an angle on the surface of the parking lot as they did on the night of the occurrence, or that during the period there were weeds growing above the top of the railroad tie and pole as existed on that night, or that during that period the lighting conditions were the same as at the time and place of plaintiff's fall. Plaintiff points out that despite defendant's failure to make such proof, it nevertheless





received the benefit of the evidence it sought to introduce as Mr. Berg's answer was not stricken, nor was the jury instructed to disregard it. Defendant states that the record shows that when the controversial testimony of Mr. Berg was attempted to be elicited, counsel for plaintiff made a general objection which was promptly sustained, and that this general objection does not cover the specific objection plaintiff now advances for excluding the testimony. Defendant, citing Johnson v. Bennett, 395 Ill. 389, 398, states that specific objection to evidence must be made in all instances where the objection, if specifically pointed out, might be obviated or remedied. Defendant suggests that under the circumstances its counsel was given no opportunity to supply the foundation that plaintiff contends was a condition precedent to the introduction of the excluded evidence. It is interesting to note that in the Johnson case the court found that the trial judge did not err in sustaining the objection to the admissibility of the proffered testimony. As plaintiff's general objection was sustained, no question arose as to the adequacy of the objection. Defendant did not make any offer to prove that the condition of the parking lot was substantially the same as on the night of the occurrence. Under the condition of the record the court did not err in sustaining the objection to the testimony of Mr. Berg.

Finally, the defendant maintains that the verdict of \$28,000 is excessive. Plaintiff, who was 23 years old at the time of the occurrence, sustained serious, permanent and painful injuries. He had been in good health prior to



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the mishap. When he fell he seriously dislocated the head of the humerus of his left arm. The fall caused a defect in the anterior capsule of the joint, which caused a tear in the capsule and caused the head of the humerus to slide underneath the scapula. In addition to the tear there was a notch and defect in the head of the humerus of the shoulder so that he not only had a defect in the bone but the cartilage was worn off there and the bone was flattened due to the recurrent dislocations. During the period between the mishap and the operation four years later, his arm had dislocated seven or eight times. The bone stuck out through the chest and was very painful. On each dislocation he had no control of his arm. In the operation Dr. Schneider sewed the muscles to prevent recurrent dislocation and he permanently limited the motion of the shoulder joint to 30 degrees out of a full 90 degree range of motion in the shoulder joint. He stated that plaintiff would never have a normal arm or shoulder following the operation and that the motion would always be limited. We are of the opinion that the damages assessed by the jury are not excessive.

For the reasons stated the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

FRIEND, P. J., AND NIEMEYER, J., CONCUR.

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It is used for the purpose of determining the value of the  
property in the hands of the decedent at the time of his death  
and for the purpose of determining the value of the property in the  
hands of the transferee at the time of the transfer.

1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

1. *Journal of Management Studies*, 1996, 33, 1, 1-14.

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46735

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

JOHN V. GARRITY,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO

8 I.A. 557

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

An information charged that on November 5, 1954, John V. Garrity unlawfully and wilfully assaulted Thomas Callahane with a deadly weapon, to-wit: a revolver, with intent to inflict upon Callahane bodily injury, without any considerable provocation, the defendant "being then and there possessed of an abandoned and malignant heart." On a plea of not guilty in a trial without a jury the court found the defendant guilty in manner and form as charged in the information and assessed a fine of \$50 against him, to reverse which he has prosecuted a writ of error.

The report of trial proceedings consists of an agreed statement of the testimony. Thomas Callahane, the complaining witness, testified that on November 5, 1954, at about 8:30 P.M. he was driving his automobile in a northerly direction on Marshfield Avenue between 65th and 64th Streets in Chicago; that as he came to the middle of the block he was prevented from proceeding further by an automobile parked diagonally in the middle of the street, facing in the opposite direction of his line of travel; that there was not room enough to drive his automobile past, so he stopped;

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that immediately thereafter another car came up behind witness's car; that both cars began sounding their horns, which continued for what seemed like several minutes; that witness then noticed a man, later identified as the defendant, get into the parked car and drive it abreast of witness's car; that ~~that~~ when defendant's car came alongside witness's car, the former said: "Why are you blowing your horn?" to which witness replied, "I was blowing the horn to get you to move so I could pass." Complainant, continuing his testimony, said that the defendant got out of his car and came over to witness's car; that defendant was wearing a police uniform; that defendant's coat was open and he was hatless; that the defendant opened the door of complainant's car, grabbed him, pulled him and told him to get out of the car and turn around; and that defendant had a gun in his hand which he put in complainant's back and told him to raise his hands and give him his driver's license. Witness further stated that he did not see the gun placed at his back, but that his wife who had gotten out of the car, came around to the side of the car where he was with the defendant and shouted: "Look out, he's a policeman and he has a gun"; that the object at his back felt like a gun; that the defendant turned to Mrs. Callahane and told her, "get back into the car before you get hurt"; that she returned to her car seat; that witness gave his driver's license to defendant, who took it and told him to go to the police station at 63rd Street and St Louis Avenue where he would meet him;





-3-

that witness and his wife went to the car in back of them and asked if the occupants had seen the incident; that Mr. Damico, who was driving the car, said he had and would be a witness; that as the defendant was passing in his car, words were exchanged between Mr. Damico and defendant; that defendant told Mr. Damico that he would also see him at the station; that about ten minutes later the defendant arrived at the station; that there was no further conversation between the parties; and that witness, his wife and Mr. Damico gave statements of the happening to the police and then left the station. Mrs. Callahane's testimony substantiated that of her husband as to the street being blocked by defendant's parked automobile, the blowing of the horns and the altercation between her husband and the defendant. She said she saw the defendant holding a pistol against her husband's back while he conducted his interrogation; that she warned her husband that defendant was a policeman - he had a gun; that the defendant kept the gun pointed at her husband; that he did not point the gun at her; that after she warned her husband the defendant told her to get back in the car before she got hurt and she complied; and that the next time she saw the defendant was at the police station.

Jan Damico testified that he was 40 years old and lived with his wife and two children at 6614 South Hermitage Avenue, Chicago; that he was self-employed; that he was driving a car north on Marshfield Avenue when he came to the middle of the block between 65th and 64th Streets; that



he had to stop his car behind the car of a man later identified as the complainant because both cars were blocked from proceeding further by a car which was parked diagonally in the middle of the street facing in a southerly direction; that both cars started to blow their horns when a man later identified as the defendant got into the car that was blocking the street; that the defendant straightened out the car and started to proceed south; that when the defendant in his car was alongside complainant's car he heard the defendant say, "What the hell are you blowing your horn for?" to which complainant replied, "I was blowing my horn so you would move your car and I could pass"; that defendant stopped his car, jumped out, pulled a gun and went over to complainant's car; that the defendant opened the door of complainant's car, pulled him out of the car, turned him around to face the car and put the gun in his ribs; that the defendant had the complainant put his hands on the roof of the car and give his driver's license to the defendant; that Mrs. Callahane got out of the car and shouted, "Look out, he's a policeman and he has a gun"; that the defendant used profanity and told the woman to get back into the car before she got hurt; that she got back into the car; that the complainant gave defendant his driver's license; that defendant told him to get back into his car and drive to the police station where he would meet him; that defendant then put his gun away and got back into his car; that complainant came back to witness's car and asked if he witnessed the incident; that witness said he



had and would be a witness; that at this moment defendant pulled alongside them and witness was told by the defendant, "You follow him too, Slick"; and that defendant drove away and the others went to the police station.

The defendant testified that he was in uniform and had his automobile parked double "at the point where this occurred" while he was at the door of an adjacent house; that when he heard a horn blowing, he left the porch and immediately went to his automobile, saw the complainant's vehicle in the street, heard the horn, "perused the same in his own mind," and saw that there was room enough for an automobile to pass his automobile in the position in which it was parked; that he got into his automobile and drove abreast of the automobile "sounding its horn"; that in an offhand manner he spoke to the complainant and said: "What's the matter with you"; that receiving no response except a continual sounding of the horn he got out of his car, went to complainant's vehicle, identified himself as a police officer and asked him to get out of the car and produce his driver's license; that the door opened quickly and defendant was forced to jump back; that while in the act of jumping back to be out of the way of the door, the defendant's pistol fell out of its holster; that when this happened, the hammer of the gun broke off; that the defendant retrieved the gun and at the same time told the complainant to face the automobile, informed him again that he was a police officer and told him to place his hands on the roof of the automobile; that he then "proceeded to say to the complainant, 'What's the matter



with you, blowing your horn. You had plenty of room to go through. Let's see your driver's license'; that after a conversation about the horn blowing and after examining the license of complainant, he told him to go to the police station or follow him there; that upon arrival at the police station he was informed that he could not sign complaints until a superior officer made an investigation of the matter; that after several hours had passed, defendant was arrested and complaints were filed against him. On cross-examination, the defendant testified that he could not recall the house where he had been or to whom he was talking prior to getting into his car; that he was not on "official duty" at the time of the incident; and that he had consumed a few glasses of beer after getting off duty at 4:00 P.M. of that day.

The defendant insists that the acts complained of were committed while he was making a lawful arrest and were in connection therewith. He states that the loud prolonged sounding of the two automobile horns, in violation of an ordinance that no horn or other warning device shall emit an unreasonably loud or harsh sound, constituted reasonable grounds for making the arrest and that the arrest was lawful. He maintains further that the evidence fails to establish that he intended to inflict a bodily injury on complainant; that the evidence does not prove an assault with a deadly weapon; that he did not attempt to fire a shot or strike the complainant; that he used no unnecessary force but only such force as was necessary in the performance of his





duty as a police officer in making a lawful arrest; and that the People failed to prove all the elements of the offense with which he was charged.

The trial judge, who had the opportunity to see and hear the witnesses, chose to believe the testimony introduced by the witnesses for the People. The law has committed to the trial judge, where a case is tried without a jury, the determination of the credibility of the witnesses and of the weight to be accorded to their testimony, and if the evidence is merely conflicting an appellate court will not substitute its judgment for that of the trial court. There was evidence to establish beyond a reasonable doubt that the defendant's unoccupied automobile was blocking the roadway. The action of Callahane and Damico in sounding their horns in an endeavor to attract the attention of the absent driver did not violate the ordinance against making an unreasonably loud or harsh sound. In fact, the ordinance on which defendant relies requires that every motor vehicle when operated on any public way shall be equipped with a horn in good working order and capable of emitting sound audible under normal conditions from a distance of not less than 200 feet. The horns were in good working order as evidenced by the fact that the defendant in a relatively short period of time appeared, entered his car and drove it alongside the complainant's car. No reasonable person could maintain that under the circumstances the defendant had any right to arrest the complainant or Damico.

[illegible]

The defendant in his briefs assumes that he arrested Callahane. The testimony shows that at defendant's request he gave his driver's license to the defendant and that defendant told him to go to the police station where he would meet him. Defendant also told Damico to go to the station. Defendant did not tell either driver that he was under arrest. At the police station defendant was informed that he could not sign complaints against either driver until a superior officer made an investigation of the matter. Apparently, no complaints were filed against either Callahane or Damico. Callahane did not resist the defendant. There was no necessity for the defendant to draw his pistol. The defendant treated Callahane as though he were a felon, when in fact he had not committed any offense. Section 660, Chap. 38, Ill. Rev. Stat. 1955, provides that when an arrest is made without a warrant either by an officer or private citizen, the person arrested shall, without unnecessary delay, be taken to the nearest magistrate in the county, who will hear the case, for examination, and the prisoner shall be examined and dealt with as in cases of arrest upon warrant. Other provisions of the Criminal Code set out the procedure to be followed. Paragraph 6 of Sec. 2 of the act governing the Municipal Court of Chicago designates as sixth class cases all proceedings for the arrest, examination, commitment and bail of persons charged with criminal offenses. There was no effort by the defendant to follow the procedure outlined in the Criminal Code. If Callahane and Damico were under arrest



until they arrived at the police station, the actions of the defendant indicate that he concurred in the decision of his superior to release them from custody.

There was competent evidence to establish beyond a reasonable doubt that the defendant, without having any ground on which to arrest Callahane, seized him, pulled him and forced him to get out of his car and turn around, to raise his hands and place them on the car and to deliver his driver's license to defendant. Defendant held his pistol against Callahane's back. There was evidence that defendant was intoxicated. Mrs. Callahane warned her husband that the defendant was a policeman and that he had a gun. Defendant told her to get back into the car before she was hurt and she did. The record supports the judgment that the defendant unlawfully and wilfully assaulted Callahane with a deadly weapon with the intent to inflict on him a bodily injury without any considerable provocation and under circumstances showing an abandoned and malignant heart.

For the reasons stated the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

FRIEND, P. J., and NIEMEYER, J., CONCUR.

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There was no apparent evidence to establish beyond a

reasonable doubt that the defendant, without having any  
means on which to support himself, called him, killed him  
and forced him to get out of his car and turn around, so  
that his hands and arms were on the car and he could  
not move his arms to defend himself. He was held by his

arms against the defendant's back. There was evidence that  
the defendant was intoxicated. Also, the defendant wanted her husband  
but the defendant was a woman and that he had a gun.

The defendant testified that he was told the defendant was  
killed and the girl. The witness explained that she was

the defendant's wife and that she was killed.

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46765

CITY OF CHICAGO,

Appellee,

v.

JOHN V. GARRITY,

Appellant.

18 I.A. 558<sup>2d</sup>

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

A complaint filed in the Municipal Court of Chicago charged that John V. Garrity on November 5, 1954, in the City of Chicago, did make an improper noise, riot, disturbance, breach of peace, or diversion, tending to a breach of the peace, within the limits of the city, in violation of the Municipal Code. On a plea of not guilty the case was tried without a jury, resulting in a finding and judgment of guilty, and that he pay a fine of \$25. He appealed. The report of trial proceedings containing the statement of the testimony of the witnesses appears in an opinion filed this day in People v. John V. Garrity, Case No. 46735. It is unnecessary to repeat the statement of facts set out in that case.

Defendant asserts that the acts complained of were committed while he was making a lawful arrest and were in connection therewith, and that the evidence shows that he used only such force as was necessary in his duties as a police officer in making a lawful arrest. In the other case we decided that he was not making a lawful arrest and that he was, in fact, committing an assault with a

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deadly weapon without any provocation. The opinion in the companion case disposes of this point.

Defendant urges that his acts did not constitute a breach of the peace and that the finding of the trial court is contrary to the law and the evidence. Plaintiff proved by a preponderance of the evidence that defendant used profanity, that he was intoxicated and that he misused his authority as a policeman. We are satisfied that the plaintiff proved by a preponderance of the evidence that the defendant violated the ordinance<sup>by</sup> committing a breach of the peace.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

FRIEND, P. J., and NIEMEYER, J., CONCUR.

... ..

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46716

LEWIS A. CAHN,

Appellant,

v.

THE EDGEWATER HOSPITAL, INC.,  
M. S. MAZEL and CHARLES R.  
MORROW, as Trustee,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

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8 I.A.<sup>2d</sup> 559

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff filed an unsworn complaint in equity to remove defendant Morrow as trustee under a certain trust indenture to secure a note issue totalling \$235,000, and to set aside a conveyance of real estate by the Edgewater Hospital Association, Inc., the maker of the notes in question. Defendants' motion to strike the complaint was sustained, and plaintiff electing to stand upon the complaint, the court dismissed it for want of equity. The sufficiency of the complaint is the only question presented upon this appeal.

The complaint in substance alleges that plaintiff is the owner and holder of one note of the issue, in the sum of \$500, executed by the Edgewater Hospital Association, Inc.; that said note had attached thereto interest coupons maturing one each six months from August 1, 1938, to February 1, 1955, with interest payable at the rate of 3% per annum; that said Edgewater Hospital Association, Inc., was the owner of a modern hospital, with a capacity of 100 to 120 beds, together with operating rooms and laboratories; and that defendant Mazel was the president and Busch the secretary.



It is further alleged that on June 30, 1939, Edgewater Hospital Association, Inc., executed a deed, without consideration, to the defendant Edgewater Hospital, Inc., conveying the said real estate, and at the same time conveying all of its interests and all other assets to said Edgewater Hospital, Inc., without any consideration; and that said conveyances were fraudulent and void insofar as the rights of the plaintiff and all other noteholders similarly situated are concerned. A copy of the trust indenture was attached to the complaint.

It is further alleged that said Edgewater Hospital Association, Inc., violated and breached the covenants of the trust indenture in that it permitted itself to be dissolved by action of the Attorney General of the State of Illinois, and thus surrendered its franchise and charter to do business; that a decree was entered in the Superior Court of Cook County on November 19, 1942, dissolving said corporation, and that since November 19, 1942, said Edgewater Hospital Association, Inc., has been out of existence; that on July 20, 1938, said Edgewater Hospital Association, Inc., notified the holders of all the said debenture notes that payment of semiannual installments of interest due on the 1st of August, 1938, would not be paid until further action of the Board of Directors; and that said interest notes were not paid upon their maturity and have not since been paid, nor has the successor corporation paid them.

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The complaint further alleges that the formation of defendant Edgewater Hospital, Inc., was a subterfuge resorted to by the original Edgewater Hospital Association, Inc., for the purpose of evading payment of the notes, and that said defendant is but a mere continuation of the Edgewater Hospital Association; and that the defendant corporation continued to carry on the hospital business at the same place with the identical officers, directors and personnel.

It is further alleged that defendant Morrow, as trustee, has been notified from time to time by the various noteholders of the default in payment of said interest notes and of the fraudulent conveyance; that the various noteholders and plaintiff have requested and demanded of defendant Morrow, as trustee, to take action from time to time "under the provisions of the trust indenture," attached to the complaint as an exhibit; and that said trustee has taken no action to conserve the interests of the plaintiff and other noteholders similarly situated, and has stated that he will take no action.

The form of note set forth in the exhibit attached to the complaint, like the one held by plaintiff, contained the provision:

" \* \* \* that no holder shall have any right to institute any suit, action or proceeding for the collection of the note or any interest coupon, either at law or in equity, or for the enforcement of any remedy, unless such holder has given the trustee written notice specifying the nature of the default and said default shall have continued for the period specified in the Trust Indenture, nor unless also the holders of at least 66-2/3% of the total amount of said notes then outstanding and unpaid shall have served similar notice





upon the trustee, accompanied by written request that trustee commence suitable legal action, and unless trustee shall have been indemnified or offered indemnity to his reasonable satisfaction against any costs, expenses and liabilities to be incurred thereby, and said trustee after receiving such notice, request, and indemnity, shall have refused to institute any suit or other action for the collection of the principal of the note and interest thereon. Such notice, request and offer of indemnity are and shall be conditions precedent to any action by the trustee for the collection of the note or any interest thereon.

"The holder or holders of this note and interest coupons appertaining thereto shall not enforce any rights hereunder or under the said Trust Indenture except in the manner herein and therein provided, and all proceedings at law or in equity for the collection of this note or interest thereon or for the enforcement of any covenant herein or in the Trust Indenture contained shall be instituted, had and maintained in the manner provided for the equal, ratable, proportionate and common benefit of all holders of such outstanding and unpaid notes and interest coupons."

The complaint is fatally defective in the following respects: (a) It does not allege when plaintiff acquired the note, and, the pleading being construed against the plaintiff, there could be no fraudulent conveyance as to him if he acquired the note in question after the conveyance. National City Bank v. Cowdin, 343 Ill. 430. (b) The provisions of the note bar plaintiff's right to institute action, since there is no allegation that the required 66-2/3% of the outstanding noteholders had made the demand on the trustee to institute action, and no allegation that there was any indemnity offered to the trustee, as required by the provisions of the note. Such provisions have been held valid. Dillon v. Elmore, 361 Ill. 356, 361; Pearlman & Co. v. Lincoln-Belmont Bldg. Corp., 251 Ill. App. 135, 137; Rosenzweig v. Roitman, 266 Ill.



App. 124, 128. Under such circumstances, the failure of the trustee to take action cannot be regarded wrongful, as a matter of law, to justify his removal as trustee. Pearlman & Co. v. Lincoln-Belmont Bldg. Corp., supra.

At best, plaintiff may only be considered a simple creditor, who would have no standing to set aside the conveyance in question as fraudulent against him. Madigan Bros., Inc. v. Garfield State Bank, 310 Ill. App. 358, 364; Austin v. Bruner, 169 Ill. 178, 179.

For the reasons indicated, the decree of the Superior Court is affirmed.

AFFIRMED.

KILEY, J. CONCURS.

LEWE, P.J., TOOK NO PART.

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CLARENCE McCOY, d/b/a C. McCOY  
FURNITURE,

Appellee,

v.

SAMUEL H. SMITH,  
Defendant below,

A. E. GORDON, d/b/a A.E. GORDON  
& SONS,

Garnishee below,

Appellant.

81A<sup>2d</sup> 560

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a garnishment proceeding based upon a judgment for \$1,398.05 confessed by plaintiff against defendant upon a conditional sales contract for the purchase of furniture. After final judgment was entered against him, the garnishee filed a motion in the nature of coram nobis to vacate the judgment. The motion was denied. Later a similar motion was denied. The garnishee's notice of appeal and amendment thereto (Ill. Rev. Stat. 1953, Chap. 110, Sec. 259.33) bring before us the orders of January 7, and February 23, 1955, denying the relief prayed in the garnishee's petitions.

Judgment was confessed May 25, 1954. Execution was issued June 1st and was returned "No Property Found" June 4th. Garnishment summons was issued October 29, 1954. Conditional garnishment judgment was entered November 15, 1954. Scire facias was issued directing garnishee to show cause why judgment should not be made

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final. In default of his appearance, the conditional judgment was confirmed November 26, 1954 in the amount of \$1,429.35. On January 7, 1955 the garnishee presented his first motion to vacate and on January 14th he presented his second motion.

~~(X)~~ The question is whether the rulings denying the motions were correct. The test is whether the facts alleged, if known by the judge at the time, would have prevented entry of the judgment.

Plaintiff, in support of the judgment and orders, argues that the first petition was insufficient, that it alleged only conclusions and that it required no answer since there was no reason alleged for the delay from November 26, 1954 to January 7, 1955. He also argues that the petition should have been, and was not, presented to the same judge who entered the judgment.

~~(X)~~ The first petition averred that on the day the final judgment was entered the garnishee appeared at the opening of court in the courtroom designated in the summons; that he was told by the court clerk to fill out the interrogatories accompanying the summons; that he answered "No Funds" in the interrogatories, had his signature thereto acknowledged and returned the "answer" to the court clerk; that the "answer" was stamped as filed on that day and was placed in the files; and that the filing of the answer was not entered by the clerk so as to be brought to the court's attention.





~~13~~ These allegations are not of conclusions, but of ultimate facts. Particularizing the ultimate facts alleged is a matter of evidence. These particular facts and the facts argued here by plaintiff, with respect to the garnishee's lack of diligence and other matters, are properly presented in the trial court. No motion to strike because of insufficiency or for conclusions was made by plaintiff, no motion was made for more specific pleading and no evidence was taken. We therefore take the facts averred as true. Lichter v. Scher, 4 Ill. App. 2d 37, 41.

~~14~~ We think the first sworn petition contains sufficient facts to justify the relief prayed on the grounds of the clerk's mistake which prevented the garnishee making his defense (Ellman v. De Ruiter, 412 Ill. 285, 291) to the confirmation of the conditional judgment. These facts if known by the judge at the time of the entry of the final judgment would, in our opinion, have prevented his entry of the judgment.

~~15~~ In this court plaintiff attacks the petition for failing to show diligence in that no averment excuses the delay from November 26, 1954 to January 7, 1955 in presenting the petition. There is no merit to the contention. The statutory limitation for making the motion, at the time of the hearing, was five years. Ill. Rev. Stat. 1953, Chap. 110, Sec. 196.

~~16~~ The final judgment of November 26th was entered by Judge Daly in Municipal Court, Room 902. The first



petition was presented in the same courtroom before Judge Sullivan, then sitting there. The record does not show that plaintiff made the objection then, that is made now, that the petition should have been presented to Judge Daly. The Supreme Court in People v. Sheppard, 405 Ill. 79 at page 82, said that a reasonable construction of Section 72 of the Civil Practice Act (Ill. Rev. Stat. 1953, Chap. 110, Sec. 196) was that the motion should be presented to the same judge who entered the judgment. In Ellman v. De Ruiter, however, the judge who entered the judgment had become ineligible and "of necessity" the motion was presented to and heard by another judge. This court has held against the contention that the motion "can be heard only by the judge who entered the judgment." Central Cleaners and Dyers, Inc. v. Schild, 284 Ill. App. 267.

~~12/1~~ The petition of January 7th does not aver any reason for garnishee's failure to appear November 15, 1954. Nevertheless, the Garnishment Act presupposes an opportunity after conditional judgment "to show cause why such judgment should not be made final." Ill. Rev. Stat. 1953, Chap. 62, Sec. 8. If it be said that showing cause would require the garnishee to explain the earlier default of appearance the answer is that equitable principles are now applicable to prevent injustice, (Ellman v. De Ruiter, 412 Ill. 285) and the garnishee will have the opportunity to furnish the explanation.

For the reasons given we think the orders of January 7, and February 23, 1955 were not correct and



-5-

they are reversed and the cause is remanded with directions to vacate the final judgment of November 26, 1954 and for further proceedings enabling garnishee to "show cause." The points raised here by garnishee and not passed upon by us may be made in the trial court.

ORDERS REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

LEWE, P. J., AND FEINBERG, J., CONCUR.

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46770

FRUEHAUF TRAILER COMPANY, a  
corporation,

Appellant,

v.

UNIVERSAL TRUCK LEASING CORPORA-  
TION, a corporation, BEN LEVENTHAL,  
EMPIRE TRUCK LEASING CO., a corpora-  
tion, FRED GARY, SALON TRUCKING CO.,  
INC., a corporation, and JOSEPH H.  
SALON,

Defendants,

SALON TRUCKING CO., INC., a  
corporation, and JOSEPH H. SALON,

Appellees.

414A  
81A. 561  
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

JUDGE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this trover action to recover the value of two truck bodies, allegedly converted by defendants. A trial without a jury resulted in a judgment for plaintiff for \$500, entered on December 16, 1954, against defendant Empire Truck Leasing Company and defendant Gary, for the value of one of the truck bodies. Judgment was also entered in favor of plaintiff against defendants Salon Trucking Company and Joseph Salon for \$644, for the value of the other truck body. A special finding that malice is the gist of the action was included in the judgment. The judgment against defendant Empire was paid and satisfied on February 15, 1955.

Defendants Salon Trucking Company and Joseph Salon on March 2, 1955, filed their motion and petition to quash the capias, which had been issued against them upon the judgment entered, and to satisfy or vacate the judgment which had been rendered. Upon a hearing, the court on May 24, 1955, entered an order quashing the capias and vacating the judgment against the latter defendants. The appeal is from this order.

Plaintiff contends that the lower court was without jurisdiction to vacate the judgment, which had been rendered more than 30 days previously. Defendants' motion and petition

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to vacate is essentially in the nature of a common law writ of audita querela. The question arises whether the petition sets up sufficient reasons for such relief.

The petition alleges that since the rendition of the judgment against defendants Salon, the judgment against Empire was paid and satisfied; that the complaint for trover and conversion is against all defendants as joint tort-feasors; that the satisfaction of the claim or judgment against one of the joint tort-feasors is a release of the others; and therefore the judgment against defendants Salon should be vacated or satisfied of record. It becomes necessary to determine whether defendants are joint tort-feasors, or whether they are severally tort-feasors joined in the same action.

The complaint in substance alleges that plaintiff held a chattel mortgage upon the two truck bodies to secure the purchase price of a sale of them to defendant Universal Truck Leasing Company; that defendant Universal leased or turned over possession of said truck bodies to Empire, and that defendant Empire delivered possession thereof to defendants Salon; that demands were made by plaintiff on defendants Empire and Salon to turn over the respective trucks found in their possession; and that they refused and failed to comply with said demand. The complaint prayed for judgment against the defendants, or either of them, and for a finding that malice is the gist of the action, and for the issuance of a capias ad satisfaciendum against each of the defendants.

The complaint imperfectly alleges the separate conversions as to each defendant, and though it could have been more definitely and clearly alleged, nevertheless the doctrine of "aider by verdict or judgment" is applicable to sustain the judgment, notwithstanding the omission in the pleading. Gustafson v. Consumers Sales Co., 414 Ill. 235,

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and to establish it sound and legal. We have not

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Submitted: 1996-09-10; Accepted: 1997-03-10; Published: 1997-05-01

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Figure 1:  $\log_{10}$  of the number of *Salmonella* spp. per gram of feed.

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240; Lustig v. Hutchinson, 349 Ill. App. 120, 126, and cases there cited.

No point is made that the defendants were not properly joined in the same action. We think the complaint sufficiently establishes the right of plaintiff to the separate judgments against defendants entered by the trial court; that their conversions of the mortgaged property were separate conversions and not a joint conversion, and therefore defendants are not joint tort-feasors. There is no merit in defendants' position that a satisfaction of a separate judgment against the one tort-feasor results in a satisfaction as to all. The Civil Practice Act permits separate judgments in the same action. The common law rule of unit judgment does not apply. Chmielewski v. Marich, 350 Ill. App. 379, affirmed 2 Ill. 2d 568.

The ancient common law writ of audita querela was intended to afford relief from the consequences of a judgment or an execution on the ground of some matter of defense or discharge arising subsequent to the rendition of the judgment or the issuance of the execution. It is the proper remedy to invoke by a defendant to avoid an execution which has been sued out after the judgment has been released, paid or satisfied on a prior execution as to him, or where any other matter has occurred which operated as a discharge of the judgment. 7 C. J. S. Audita querela, §2; Gardner v. Kohs, 346 Ill. App. 468 (Abst.); Nelson v. Berry, 330 Ill. App. 244 (Abst.).

It follows from what we have said, no such facts are alleged in defendants' petition that justify relief under audita querela. The Municipal Court had no jurisdiction upon the instant petition to vacate the judgment against defendants Salon and to quash the capias.

The order of the Municipal Court is reversed.

REVERSED.

KILEY, J., concurs.

LEWIS P. J. took no part.

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In the  
APPELLATE COURT OF ILLINOIS  
Fourth District

181A. 2d 502

Hermine Staikoff,	)	
	)	
Plaintiff-Appellee,	)	
	)	Appeal from the City
vs.	)	
	)	Court of the City of
Illinois Terminal Railroad	)	
Company,	)	East St. Louis, Illinois.
Defendant-Appellant.)	)	

Hon. Joseph A. Troy, Presiding Judge.

Scheineman, J.

Plaintiff, Hermine Staikoff, while a passenger in a private automobile, suffered personal injuries in an intersection collision with a bus operated by defendant, Illinois Terminal Railroad Company, in the City of East St. Louis. In this suit she obtained a verdict of \$17,500 upon which judgment was entered, including interest thereon, and this appeal ensued.

The defendant contends that a verdict should have been directed in its favor, on the ground, under the evidence, that the defendant was not guilty of negligence, the plaintiff was guilty of contributory negligence, and the proximate cause of the collision was the negligence of the driver of the car in which she was riding. In the alternative it is contended a new trial should be



ordered on the ground the verdict is contrary to the manifest weight of the evidence, is excessive and and based on prejudice, and that there were errors in the instructions.

The testimony for plaintiff indicates that she and another woman were being given a ride home from work by the driver of the car. All three worked in St. Louis, Mo., and lived in Madison, Illinois. They had on several occasions been given such rides to or from work, by the same driver, but had no special arrangement. On this occasion all three were in the front seat, with plaintiff in the middle. They proceeded via East St. Louis, and at the time of the collision were crossing 6th Street at Pennsylvania. The bus was traveling north on 6th, which was a preferential street, and the car was crossing from west to east. None of this seems to be disputed.

Plaintiff's driver testified that he was familiar with the intersection and the stop sign on the cross street. He states he stopped at the sign and looked both ways, that he saw the bus to his right about 200 feet away, nothing was coming from his left, and he judged he could cross ahead of the bus. He started across, and about the middle, moving at 10 to 15 MPH, saw that the bus was only about 50 feet away and coming fast, about 30 MPH in a 20 MPH zone. He tried to accelerate to get out of the way but the bus struck the car on its right door.





The bus never slowed down prior to the impact, and did not swerve. The impact knocked his car some 40 or 50 feet sidewise down the street in a diagonal direction back toward the left side of 6th Street where it collided with a car parked at the curb, which prevented further movement.

Plaintiff testified that the driver of the car stopped at the intersection, that all three looked to right and left, she did not then see the bus, but saw it when the woman on the right said something about it, she then saw the bus approaching at a high speed. She did not say anything to the driver about the bus prior to the impact. She was not clear as to its distance when she first saw it.

A pedestrian who was crossing the street at the time of this incident was an eyewitness to the actual collision. He states that, as the car going east was crossing the center line of 6th Street, the bus was about 50 feet away and coming at 25 to 30 miles per hour, that it did not slow down or swerve, at least not until just about at the moment of impact. At that moment the car was just past the center line of 6th and in the right lane thereof.

From the bare recital of this testimony, it is apparent that the court could not direct a verdict for defendant. The defense appears to be under the impression that a person riding in a car has an absolute



duty, as a matter of law, to observe approaching vehicles and warn the driver. This is not the law. So long as the driver appears to be using due care, the passenger is under no absolute duty to take any specific action, and need not warn of an approaching vehicle which the driver sees. Gillan v. Chicago N. S. & M. Ry. Co., 1 Ill. App. 2nd 466. Smith v. Carter, 302 Ill. App. 235.

In the Gillan case the court said: "Except in rare instances, as when danger hidden from the driver is or should be obvious to a passenger, the duty of the latter to act begins only when the driver ceases to exercise due care for the safety of the occupants."

In Smith v. Carter, 302 Ill. App. 235, the court said: "A passenger in an automobile need not warn the driver of the approach of other automobiles which the driver sees." And further stated under the evidence, "it must be presumed that the driver saw the approaching automobile, but even if the driver did not, it was a question of fact to be determined by the jury whether the plaintiff was guilty of contributory negligence." In the case before us the question of contributory negligence was clearly for the jury.

As to the rights and obligations of the bus driver, who was on the preferential street, the law is equally well settled. In Bently v. Olson, 324 Ill. App. 281,



it was held that a right of way statute does not give an absolute right to proceed regardless of the circumstances, that though a person may have the right of way, he, nevertheless, is also obliged to use due care. The court quotes with approval the opinion of Justice Cardozo in *Ward v. Clark*, 232 N.Y. 195: "The privilege thus conferred (by a right of way statute) is not inflexible and absolute. A right of way, like a burden of proof, will establish precedence when rights might otherwise be balanced. It helps us little when without it the balance would be unequal. \* \* \* The plaintiff was not to wait until there was no other car in sight. Such a rule would be unworkable in crowded cities.

In *Kerchoff v. Van Scoy*, 301 Ill. App. 366, it is stated that the question as to who, under the statute, is entitled to the right of way involves a determination as to the relative speeds and distances from the intersection and the law is that a driver approaching an intersection from the left of a car approaching the same intersection must decide, as a reasonably prudent person, whether these relative distances and speeds are such that he may safely cross, or whether they are such that it is his duty to yield the right of way."

See also *Thomas v. Buchanan*, 357 Ill. 270, *Anderson v. Middleton* 350 Ill. App. 59; *Walker v. Shea-Matson Trucking Co.*, 344 Ill. App. 466.



In applying these rules as to preferential streets, it is plainly a question for the jury in this case whether the defendant's driver acted with reasonable care, or negligently ignored the fact that a vehicle ahead was in the intersection and crossing it before he reached it. The same thing is true as to whether the driver of the car was negligent. Even if he was, such negligence is not imputed to the passenger, and therefore is no defense against the negligence of the bus driver. *Thomas v. Buchanan*, 357 Ill. 270; *Price v. Illinois Bell Tel. Co.*, 269 Ill. App. 581.

The denial of the motion for directed verdict was proper.

The defendant's evidence contradicts that of plaintiff in several material respects. Three women passengers on the bus testified that they saw the car approach from the left and that it did not stop at the intersection. One of them stated that the driver put on his brakes as soon as possible. Another woman seated in the forward part of the bus did not see the car as it approached.

The bus driver testified that he was traveling about 20 M.P.H., that he saw the car come into the intersection and it did not stop, that he was about 30 or 40 feet from the car when he first saw it, that he promptly applied his brakes and attempted to swerve. He stated that, at 20 miles per hour, he can stop in 50 feet. Also,





that the bus went about a bus length after striking the car, and the bus is 32 feet long.

The position of the passengers in the bus and the arrangement of the seats was fully described to the jury which had the primary duty of determining the credibility of the witnesses and the weight to be accorded them. In doing so the opportunity of the witnesses to see what they testify about is a proper factor, as well as other circumstances in evidence. As for the driver, it is possible to make computations, which would show that with a car coming from the left at a speed of 10 or 15 M.P.H. (which is undisputed) and a bus moving at 20, the collision could not have occurred in the manner it did.

As a matter of fact, the pictures in evidence show the damage on the car begins back of the headlight and extends along the fender and single door of that side, with the greatest depression about midway of the car, on the front part of the door. The force of the impact and its results are also factors to be considered. The force is indicated not only by the distance the car was hurled sidewise, but also by the fact that its forward momentum was partly reversed, sending the car diagonally back to the left. This was the testimony of plaintiff's witness and was not contradicted.

In the face of the conflicting testimony, coupled



with the undisputed physical facts, the jury might have deemed it proved by a preponderance of evidence that the bus driver was relying entirely on the "preference" for his advance, and was failing to maintain a proper lookout for cross traffic in the intersection ahead of him, and that he was traveling at excessive speed in the 20 mile zone or the car would have cleared the intersection safely. While different findings and calculations might be made, it is not the province of this court to consider other possible theories since the one the jury adopted is within the scope of the evidence. Lindroth v. Walgreen Co., 407 Ill. 121. In view of the conflicting evidence and the physical facts which tend to support plaintiff's theory, it cannot be held that the verdict is contrary to the weight of the evidence.

As to the amount of the verdict, it appears that the plaintiff suffered a fractured pelvis on both sides, which will mean some permanent disability, she still suffered pain therefrom some eight months after the occurrence and the doctor testified this would continue in the future. She had lost her job, did not know when she could go to work again, had lost about \$2500 in earnings to the time of trial besides medical and hospital expenses, and she is about 37 years of age. There are other possibilities which are in dispute.



The question of the amount of damages is primarily one for the jury. *Ford v. Friel*, 330 Ill. App. 136; *Mueth v. Jaske*, 302 Ill. App. 289, 296. Omitting the matters in dispute and confining ourselves to the items above listed, we find no basis for this court to substitute a different judgment for that of the jury as to the proper amount of damages, nor is there any evidence or indication of passion and prejudice in the record before us.

Upon examining the instructions as a whole we find them correct and understandable. This is not to say that variations of wording are the best model. The instructions fairly required the plaintiff to present a preponderance of evidence, but the word "preponderance" was not always iterated in phrases such as "if you find from the evidence," or "if you further find from the evidence," etc.

Likewise, the instructions used the word "proximate" or "proximately" in normal fashion in all cases except one, in which it appeared as "approximately." This deviation is not uncommon, but it is observed that the defense did not cite a single precedent in which it was held reversible error. Of these two alleged errors, the first requires an assumption of extraordinary stupidity on the part of the jury, while the second assumes an extraordinary nicety of discrimination in the use of words. The forms of instructions given in this case have been considered by courts before and held not reversible error. This



court arrives at the same conclusion.

The rulings of the trial court were correct,  
the evidence is adequate to justify the verdict and the  
judgment is affirmed.

Judgment Affirmed.

Bardens, P. J. and Culbertson, J., concur.

Publish Abstract Only.

**FILED**

FEB 1 - 1956

*David J. Mallitt*

CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS





FILED

FEB 1 - 1956

*David J. Mallitt*

CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS

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In the

APPELLATE COURT OF ILLINOIS

Fourth District

October Term 1955

81.A.<sup>2d</sup> 5C2

W. T. Bryant,	)	
	)	
Plaintiff-Appellee,	)	Appeal from the
	)	
vs.	)	City Court of
	)	
August Recklein,	)	East St. Louis, Illinois
	)	
Defendant-Appellant.)	)	

Hon. J. E. Fleming, Judge Presiding.

Scheineman, J.

The plaintiff, W. T. Bryant, a painter by trade, was injured while plying his trade on premises owned by defendant, August Recklein, allegedly by the negligence of agents and servants of the defendant. Judgment was entered on a verdict for plaintiff of \$4000 and defendant's subsequent motions were overruled, resulting in this appeal.

Defendant contends verdict should have been directed in his favor on the ground there was no evidence of any negligence on his part, and that the evidence establishes contributory negligence on the part of plaintiff.



There is no substantial dispute as to facts: a structure referred to as a "canopy" was attached to the building being painted, which was a filling station, and it prevented access to parts of the structures to be painted. Plaintiff called this to the attention of defendant, who then had the canopy detached from the building and stood on its end on the concrete apron, near where plaintiff was working.

This canopy was described by plaintiff as two panels of window-lights, each nearly ten feet high, 40 inches wide, and 3 inches thick. The panels were fastened together along the length, in a V shape, and contained a total of 42 panes of glass, with a total weight of nearly 400 pounds. It was stood on a V shaped end with its height projecting upward, without props or ties, and not fastened to anything else. While plaintiff had his back turned, it fell over on him causing his injuries. Defendant's description of the structure is somewhat vague, and no photograph or drawing has been supplied.

The defendant contends that this evidence does not show that his men were guilty of any negligence in handling the structure. So far as handling alone is concerned, this is true, and would be conclusive if the object involved had been a low compact object, such as a square box. But this object was nearly 10 feet high

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and its widest base was 40 inches. The jury could rightly regard placing the canopy in such a precarious position as negligence, since a reasonable man acting with ordinary prudence would foresee that it might sway in a breeze and that it was likely to topple over, as it did. This is not an application of the doctrine of *res ipsa loquitur*. The act of placing the canopy in its dangerous position was proved to have been committed by the defendant's employees, and the jury could properly find such act was negligence.

There was no evidence of a high and unusual wind storm such as could not reasonably be anticipated.

As to contributory negligence, there is no basis for the claim that plaintiff was in charge of the structure, equally with defendant, but it is reasonable to contend that he was able to see where the canopy had been placed, and should have foreseen the probable toppling as well as defendant, and therefore should have complained, and required its removal before proceeding with his work.

In our opinion it is a jury question whether the plaintiff was negligent in not protesting, and in going on with his work in the face of the danger. The question of what constitutes contributory negligence is ordinarily for the jury. *Blumb. v. Getz*, 366 Ill. 273; *Moran v. Gatz*, 390 Ill. 478, 486; *Moffitt v. O.L.D. Forwarding Co.*, 331 Ill. App. 278, 284. Unless all

The first of these is the fact that the  
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 results are not always the same.

reasonable minds would agree that, under the facts, the act or failure to act of the plaintiff was negligence, the court must submit the question to the jury. Seeds v. Chicago Transit Authority, 409 Ill. 566, 570; Merlo v. Public Serv. Co. 381 Ill. 300, 318. This is not a case involving such clear agreement. It must be concluded that the court did not err in overruling the defendant's motions for directed verdict and for judgment notwithstanding the verdict, and the judgment is affirmed.

Judgment Affirmed.

Bardens, P. J., and Culbertson, J., concur.

Publish Abstract Only.





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General No. 10870

Agenda No. 14

IN THE  
APPELLATE COURT OF ILLINOIS

8 I.A. 563

FILED

FEB 15 1956

SECOND DISTRICT

JUSTUS L. JOHNSON  
Clark Appellate Court Second Dist.

October Term, A.D. 1955

ALBERT P. SCHULTZ, Administrator of  
the Estate of WAYNE E. SCHULTZ,  
Deceased,

Plaintiff-Appellee,

vs.

HENRY STEPHAN, Administrator of the  
Estate of HENRY STEPHAN, Jr.,  
Deceased,

KENOSHA AUTO TRANSPORT CORPORATION,  
a Corporation,

ROBERT E. LIVINGSTON,

Defendants,

HENRY STEPHAN, Administrator of the  
Estate of HENRY STEPHAN, Jr.,  
Deceased,

Defendant-Appellant.

Appeal from the  
Circuit Court of  
Lake County.

Dove, P. J.

Albert P. Schultz, administrator of the estate of Wayne E. Schultz, filed the instant complaint against Henry Stephan, administrator of the estate of Henry Stephan, Jr., Kenosha Auto Transport Corporation, a Corporation, and Robert E. Livingston to recover for the alleged wrongful death of plaintiff's intestate. The issues made by the pleadings were submitted to a jury, resulting in a verdict finding the defendants

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Kenosha Auto Transfer Corporation and Robert E. Livingston, not guilty and a verdict finding Henry Stephan, administrator of the estate of Henry Stephan, Jr., guilty and assessing the damages of the plaintiff at \$7000.00. Upon these verdicts, appropriate judgments were rendered, and the defendant, Henry Stephan, administrator of the estate of Henry Stephan, Jr., appeals.

The evidence discloses that on the evening of January 3, 1953, Henry Stephan, Jr., Wayne E. Schultz, Gary Davis, and Iver McKinney had attended a movie in Waukegan and were returning to their homes in Libertyville in an automobile driven by Henry Stephan, Jr.: Schultz and Davis occupied the front seat with Stephan, Schultz being seated in the center between the driver and Davis. Mr. McKinney was alone in the back seat. The driver was proceeding in a southerly direction along Illinois State Route 63, which was a twenty-foot wide, two-lane blacktop highway with four-foot shoulders. As Stephan proceeded south, he passed the Serbian Monastery, and from there the road is slightly downgrade for approximately a mile and then curves to the left, and just south of the point where the road commences to turn is a culvert or bridge twenty feet east and west and thirty-three feet long north and south. Approaching this bridge from the south and proceeding in a northerly direction upon the occasion in question were two trucks owned by the Kenosha Auto Transport Corporation. The first truck was being driven by the defendant, Robert E. Livingston, and the second one by George Ash. The truck driven by Livingston had crossed the bridge and had proceeded north approximately fifty feet when the Stephan car passed it. The Stephan car proceeded south and had crossed the



bridge and reached a point about twelve or fourteen feet south of the south end of the bridge when it came in contact with the second transport driven by Ash. As a result of the collision, this truck was jack-knifed across the highway facing west. The Stephan car came to rest on the west shoulder of the highway facing north at a point about thirty feet south of the south abutment of the bridge. As a result of the collision, Henry Stephan, Jr., and Wayne E. Schultz died and this action followed.

It is insisted by appellant that the verdict is contrary to the weight of the evidence; that there is no evidence to prove freedom from wilful and wanton misconduct on the part of plaintiff's intestate and that the evidence does not disclose that defendant's intestate was guilty of wilful and wanton misconduct. It is also insisted that the trial court erred in the admission of evidence and in its refusal to give two instructions to the jury tendered by appellant.

Upon the trial, Gary Davis testified on behalf of the plaintiff that Wayne Schultz, Iver McKinney, and he left the show in Waukegan about 11:30 o'clock on the evening of January 3, 1953, and that Henry Stephan, Jr., was driving the 1952 Ford automobile in which they were riding; that they went west on the Belvidere road, turned south on Route 63, and as they were proceeding south the Stephan car was traveling between 85 and 90 miles per hour and passed one automobile going in the same direction; that the headlights on the Stephan car were on low beams; that as the Stephan car proceeded south past the monastery, Davis testified that he observed the headlights on the two transport trucks when they were south of the culvert and about 1000 feet south of the Stephan car which was then traveling about 70 miles per hour; that the lights indicated the two trucks were between one hundred and two hundred

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feet apart; that the headlights on the first truck were bright; that when the Stephan car arrived about fifty feet north of the first truck, it left the paved portion of the road and traveled with its right front and rear wheels on the shoulder; that when the Stephan car was passing the Serbian Monastery, Davis said to defendant's intestate: "We are going kind of fast, aren't we?" to which Stephan made no reply; that nothing further was said by anyone; that after the Stephan car passed the first truck it got back on the road and then went off to the ~~left~~<sup>right</sup> again; that the car then returned to the road and collided with the left side of the second truck which was then proceeding north in its proper lane of traffic; that the Stephan car at the time of the collision was going sixty miles per hour.

George Ash testified on behalf of the defendants to the effect that he was the driver of the transport truck with which the Stephan car collided; that the transport truck driven by Robert Livingston was between 400 and 450 feet in front of him as they were proceeding north upon the highway on January 3, 1953, traveling thirty-five to forty miles per hour in their proper traffic lanes; that as they so proceeded he observed the pattern of the truck lights on the truck being driven by Livingston and they were lighted and the headlights were on drive or on lower beam; that he saw the Stephan car as it approached its maximum speed, being seventy-five miles per hour, and its minimum speed, being sixty miles per hour, and at the time of the collision he, Ash, was proceeding at the rate of twenty-five to thirty miles per hour.

test again; that the headlight on the truck was not  
that when the Stephen car arrived within five feet of the  
first truck, it left the paved surface of the road and traveled  
with the right front and rear wheels on the sidewalk; that when  
the Stephen car was passing the Stephen car, it was going  
to defendant's information; that the Stephen car was not  
way, so when Stephen was on highway, it was not in the  
said by anyone; that when the Stephen car was on highway,  
timum it was on the road and was not on the sidewalk;  
again; that the car was traveling to the right and was  
the left side of the road; that when the car was on the  
in the proper lane of travel; that the car was not  
of the collision was that the car was on the  
road; that the car was on the road and was not on the  
the effect that as was the case with the Stephen car, the  
which the Stephen car collided with the car was on the  
by Robert Lively when was driving the car; that the car  
him as they were proceeding north upon the highway; that  
1943, traveling northward on the highway; that the car was  
proper from the time; that the car was not on the  
pattern of the truck lights in the front of the car;  
Livingston and they were driving on the highway; that the car  
on or lower than; that the car was not on the highway;  
its maximum speed, being approximately thirty miles per hour;  
minimum speed, being approximately thirty miles per hour;  
the collision was, and was proceeding on the road of travel;  
to thirty miles per hour.



Prior to meeting the first truck it is apparent that the Stephan car left the highway and the right wheels of this car travelled some distance upon the right shoulder and in attempting to return to the pavement, the car skidded into the path of the second truck which was proceeding in its proper traffic lane. The jury was warranted in concluding from the evidence that the Stephan car was being driven between eighty and ninety miles per hour when it first left the pavement. Whether the driver heard the comment of his companion to the effect that he was driving "kind of fast" does not appear, but at this rate of speed, only seconds intervened before the collision. In determining <sup>ing</sup> whether the driver was guilty of wilful or wanton conduct, not only speed, but all the attending circumstances must be taken into consideration by the jury (Clarke v. Storchak, 384 Ill. 564). From a review of all the evidence we believe the court did not err in refusing <sup>to</sup> ~~xxx~~ direct a verdict for appellant or in its refusal to render a ~~verdict~~ <sup>judgment</sup> in his favor notwithstanding the verdict.

It is next urged that the plaintiff failed to adduce any evidence tending to prove freedom from wilful and wanton misconduct on the part of plaintiff's intestate. The pleadings, by allegation and denial, clearly presented this issue. It is, of course, settled law that contributory wilful and wanton misconduct, if established, is a complete defense to an action charging the same wrongs. Here the evidence demonstrates that plaintiff's intestate was a passenger and that he took no affirmative action to avoid the accident. A co-passenger had protested the speed with apparently no result. It is the duty of the driver, not his passenger, to maintain a proper lookout,



Hagen v. Bailus, 283 Ill. App. 249; Hoffman v. Yellow Cab Co., 238 Ill. App. 269, and the question whether plaintiff's intestate was guilty of contributory wilful and wanton misconduct is one of fact for the jury. It becomes a question of law only when there is no possibility, from the evidence, of reasonable minds reaching different conclusions. (Geraghty v. Burr Oak Lanes, Inc., 5 Ill. 2d 153; Richmiller v. Reddick, 349 Ill. App. 465; See also O'Neal v. Caffarello, 303 Ill. App. 574.)

The defendant also contends that the Trial Court erred in refusing to give an instruction on "sudden emergency." The tendered instruction was a correct statement of the law. However, it has no application to the facts of this case. In Galeennie v. Fringer, 5 Ill. App. 2d 403, we stated: (Page 411) "Under the facts and circumstances shown by the evidence in this case, it would appear that any emergency or situation of peril created was the result of fault on the part of defendant Fringer." One cannot create an emergency by his own action and then by reason of such situation be relieved from such responsibility as the law requires of a person acting under normal conditions. (McLaren v. Byrd Inc. 296 Ill. App. 345, 356) There being no evidentiary basis for the sudden emergency instruction, it was not error to refuse it. (Rockwood v. Andrews, 345 Ill. App. 451)

The Trial Court refused one of the tendered instructions as to damages. The instruction reads: "The Court instructs the jury that this suit is brought for the benefit of the next of kin of Wayne B. Schultz, the same being his father, Albert F. Schultz, his mother, Alinda Schultz, and his brother, Allen Schultz, and that if the jury finds for



the plaintiff, in estimating the damages sustained by the next of kin by reason of the death of Wayne B. Schultz, the jury can only estimate damages to the brother, Allen Schultz, at such sum as the evidence shows that he has sustained by the death of Wayne B. Schultz and if the evidence does not show that he was receiving any support from the deceased brother, Wayne B. Schultz, and was not in a condition to require support from his brother, Wayne B. Schultz, then the jury can only estimate the damage to Allen Schultz at a nominal sum, which is One Dollar (\$1.00) or One Cent (1¢)."

In *Rost v. Nobel & Company*, 315 Ill. 357, the court, at page 375, stated: "The next of kin of the deceased were his parents and a younger brother 14 years old. *As* to the brother, the defendant asked the Court to instruct the jury that they could allow nothing in their verdict to him on account of the death of the deceased, except nominal damages. The Court erred in refusing to give this instruction. There was no evidence of the brother having received any assistance from the deceased or being dependent upon him. It was wholly conjectural whether he would ever receive any pecuniary aid from his brother, and under such circumstances it was held in *Rhoads v. Chicago and Alton R.R. Co.*, 227 Ill. 328, that only nominal damages could be recovered in an action by an administrator. The statute authorizes a recovery of such damages as the jury shall deem fair and just compensation with reference to the pecuniary injury resulting from the death to the wife and the next of kin. The law presumes substantial injury to the parents, but the damages to collateral kindred are only such actual damages as are proved."



It is clear from a study of the Host case that the refusal of the damage instruction was not the sole grounds for reversal. Rather, the reversal was for an accumulation of errors of which this was only one. In this case, the jury <sup>was</sup> ~~xxxx~~ instructed as to damages. The refusal to give the tendered instruction was not, in our opinion, reversible error. The verdict of \$7,000.00 does not indicate a substantial award for collateral kindred, rather it is within the scope of the presumed substantial loss to the surviving parents, and is not excessive.

The remaining contention of the Appellant relates to the admissibility of certain testimony of a witness who was a dispatcher in the office of the County Police, and was permitted to testify with reference to certain photographs and to state certain observations that he made with reference to the scene of the accident. <sup>we believe</sup> that the testimony, even if erroneously admitted, was harmless. A review of the record of this entire proceeding convinces us that the parties have had a fair trial and that the verdict of the jury is sustained by the evidence. The judgment of the Circuit Court of Lake County is, therefore, affirmed.

Judgment affirmed.

Ewaldi J. Conners  
Clerk of Court





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Abstract

Gen. No. 10868

Agenda No. 12

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
OCTOBER TERM, A. D. 1955.

FILED

FEB 15 1956

JUSTUS L. JOHNSON  
Clerk Appellate Court Second Dist.

8 I.A. 564

HARRY L. DIXON and SABINA E. DIXON,  
Plaintiffs-Appellees,  
  
vs.  
  
MONTGOMERY WARD & CO., Incorporated,  
a corporation,  
Defendant-Appellant.

Appeal from  
Circuit Court  
Kendall County.

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CROW, J.

This is an appeal by the defendant, Montgomery Ward and Co., from a judgment entered on a verdict by a jury in favor of the plaintiffs, Harry L. and Sabina E. Dixon, for \$5,500.00. Motions by the defendant for a directed verdict, for judgment notwithstanding the verdict, and for a new trial were denied. The plaintiffs seek to recover damages for the loss of their house and its contents by fire April 27, 1950 allegedly caused by the defendant's negligence in the installation of an automatic oil-fired furnace, purchased in November, 1949 of the defendant at its Aurora store by the plaintiffs, (the price including installation by the defendant), or by the defendant's breach of the warranty of fitness thereof, and its overheating at the time in question.

As to the furnace, the dispute principally revolves around the electrical control devices thereof, including a limit or heat control inside the furnace, and the wire connections associated therewith between the furnace and a thermostat and the thermostat

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1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

U.S. DEPARTMENT OF JUSTICE

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U.S. Department of Justice, Federal Bureau of Investigation, Washington, D.C. 20535

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

*[Faint, illegible text at the bottom of the page]*

Source: U.S. Census Bureau, *U.S. Census of the Population, 1980* (Washington, D.C.: U.S. Government Printing Office, 1982), table PC80-1A.

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and an electrical service wire. The installation was completed about December 8, 1949; the furnace worked alright for 2 or 3 weeks; during the winter some remodelling work was in process at the home, including a plywood ceiling, uninsulated, around the furnace area, and a certain amount of dust from such work might possibly have clogged or partly clogged the filters in the furnace, or lodged in the thermostat, though there is no direct evidence such occurred; when the furnace did not operate properly the plaintiff Harry L. Dixon and his father tried to adjust it, but the evidence does not indicate exactly what they did, other than that they remember using a screw driver; after several weeks of satisfactory operation it appeared to be sooting, the thermostat did not control or coordinate with the temperature, and it had overheated; a representative of the defendant was told of that about two months before the fire, he called at the home two or three times, found no one home, and did not inspect it; it appears that by pulling up a button at the bottom of the furnace it could be operated manually, which would cut out all automatic controls. On April 27, 1950 the house and contents were completely destroyed by fire, allegedly due to the overheated furnace.

The facts in evidence are substantially the same as upon a previous trial and appeal of the case, as reported in Dixon et al. v. Montgomery Ward & Co., (1953) 351 Ill. App. 75, to which reference may be had for a more detailed statement of the facts. We shall not here repeat all the facts but only refer to such as we consider necessary, under the circumstances, for the present purpose.

The pleadings are identical with those involved in the prior trial, as set forth in our prior opinion, with the exception in the present case of an additional allegation that the furnace was "defective in material and workmanship"; no argument is raised on the

and an electrical service wire. The installation was completed

about December 8, 1945; the furnace worked alright for 3 or 4

weeks; during the winter some trouble was in process as

the house, including a lighted ceiling, was heated, during the

furnace area, and a certain amount of heat from the furnace

possibly have stopped or partly stopped the flow to the furnace,

or lodged in the furnace, though there is no direct evidence

each furnace; when the furnace was in operation, it was

the furnace in the furnace, and the furnace was in the

evidence does not indicate exactly what was going on, other than that

they remember only a few things, and the furnace was in the

factory operation is apparent, and the furnace was in the

not so much as the furnace was in the furnace, and the furnace

heated; a no indication of the furnace was in the furnace, and

the furnace, and the furnace, and the furnace, and the furnace

lines, and a no indication of the furnace was in the furnace, and

by pulling up a boiler as the bottom of the furnace, and the furnace

operated normally, and the furnace was in the furnace, and the furnace

April 25, 1946, and the furnace was in the furnace, and the furnace

line, and the furnace was in the furnace, and the furnace

The furnace was in the furnace, and the furnace was in the

a previous trial, and the furnace was in the furnace, and the furnace

V. WORKINGMAN (1946) (1946) (1946) (1946) (1946) (1946) (1946) (1946)

evidence was in the furnace, and the furnace was in the furnace, and

shall not be a matter of the furnace, and the furnace was in the

consider necessary, under the circumstances, for the furnace, and

page.

The furnace was in the furnace, and the furnace was in the

trial, as set forth in our prior opinion, with the exception in the

present case of an additional allegation that the furnace was "de-

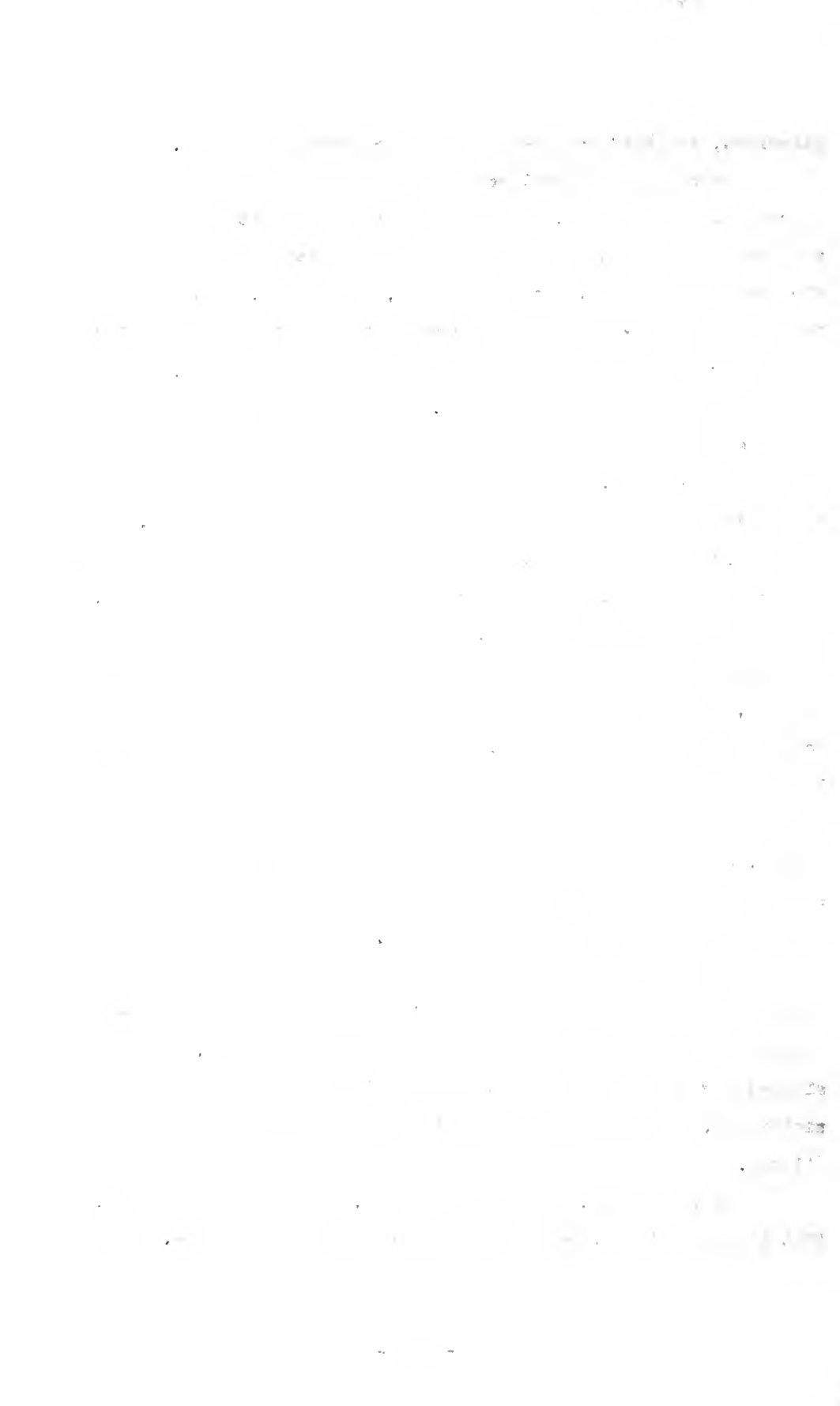
fective in material and workmanship"; no argument is raised on the

pleadings, and they need not be again set forth in detail.

On the prior appeal we reversed the judgment entered in favor of the plaintiffs, (the defendant's motions for new trial and for judgment notwithstanding the verdict having been denied by the then trial Judge), upon the ground, inter alia, that the verdict for the plaintiffs was manifestly against the weight of the evidence upon the issue of the plaintiffs' contributory negligence, and we remanded the cause for a new trial. There were other serious errors at that time, having particularly to do with the admission of certain evidence, and a statement by the plaintiffs' attorney in connection with an offer of certain inadmissible evidence. We thought then and think now, as to the defendant's alleged negligence and proximate cause, that the jury may have reasonably concluded, based on substantial testimony, that a defective heat control did not reduce the heat as it was supposed to do, and that it cannot be said, as a matter of law, that the plaintiffs failed to prove negligence or proximate cause, and that the verdict was not manifestly against the weight of the evidence on those points; we see no reason for departing now from what we've previously said as to those points, the evidence being substantially the same; the additional evidence in this respect which the defendant refers to does not materially alter the state of the proof.

The defendant now urges in its theory of the case on this second trial and appeal that the plaintiffs are barred from recovery by reason of (1) alleged contributory negligence, and (2) alleged errors in certain instructions given on behalf of the plaintiffs, and that the defendant's motions should have been allowed.

We cannot say, as a matter of law, on this second appeal, that the plaintiffs were guilty of contributory negligence. And



we did not think so on the first appeal, - our view then being, on this score, simply that the verdict was manifestly against the weight of the evidence. And, among other things, we there said that an instruction which would have told the jury, as a matter of law, that the plaintiffs could not recover if they knew of the defective condition and continued to use the furnace was properly refused. That question of contributory negligence, ordinarily, is preeminently a question of fact for the jury to determine, and can become a question of law only when, from the undisputed facts, all reasonable minds, in the exercise of a fair and honest judgment, would be compelled to reach the conclusion that there was contributory negligence: LASKO v. MEIER et al. (1946) 394 Ill. 71. Twenty-six people in this case, - two juries and two trial Judges, - have, in effect, determined that the plaintiffs were not guilty of contributory negligence, - and they may be said, for the purposes hereof, to represent a fair cross section of "all reasonable minds": JENISEK v. RIGGS (1943) 320 Ill. App. 158, (Fourth Dist.). The defendant's motions for a directed verdict and for judgment notwithstanding the verdict present only a question of law as to whether, when all the evidence is considered, together with all reasonable inferences and inferences therefrom in its aspect most favorable to the plaintiffs, and considered as true, there is a total failure or lack of evidence to prove any necessary element of the plaintiffs' case, it not being the province of the trial court or this court to weigh the evidence upon such motions: BONNIER v. CHICAGO E. and Q. R. R. CO. (1954) 2 Ill. (2d) 606; LINDROTH v. WALGREEN CO. et al. (1950) 407 Ill. 121. There is not, we believe, on this appeal such a complete absence of probative facts supporting the plaintiffs' case as to justify us, under the present circumstances, in reaching such a conclusion, as a matter of law, - nor was there





on the first appeal, - and hence the denial of the defendant's motions for a directed verdict and for judgment notwithstanding the verdict do not constitute error.

As to the defendant's motion for a new trial and the question whether the verdict, as to contributory negligence, is contrary to the manifest weight of the evidence, the situation now at this present stage of the matter is somewhat different and more favorable to the plaintiffs than it was upon the first appeal. Two different juries having before them substantially the same facts, and having been fairly instructed as to the law, have now each found the defendant guilty and have necessarily thereby, in effect, found the plaintiffs free from contributory negligence, and two different trial Judges, acting upon appropriate motions of the defendant, have now permitted the verdicts to stand. We are not unmindful that the facts clearly point to the plaintiffs having knowledge that the furnace had been operating improperly on prior occasions over a period of some months prior to the fire, that the furnace had overheated on prior occasions, that the home had been on occasion very hot, and there had been an odor of hot pine wood, and they continued to live there and use the furnace. But, at the same time, the plaintiffs purchased the furnace in reliance upon the technical, mechanical judgment of the defendant and its representatives, this was the plaintiffs' first experience with an oil furnace, it was designed, fundamentally, to operate automatically, and the facts further indicate that the plaintiffs knew that on every prior occasion when the furnace had overheated, it had also subsided and cooled off when the thermostat was turned back to 55°. On the night of the fire when the plaintiff Harry L. Dixon was preparing to retire he noticed soot or smoke belching out of the door of the furnace. He opened the furnace door and the flames were extremely high. He then turned the thermostat back to



55°, as he'd done on several other occasions under similar circumstances, with the result on those other occasions being as before indicated. He stayed up for an hour or more on this occasion before retiring, until the furnace had completely subsided and cooled off, as it had done before, and to him at that time it appeared normal. When he later awoke, however, that evening, about a couple of hours later, the house was full of smoke, flames were eating around the plenum or heat chamber at the top of the furnace in the ceiling, and the house and contents were subsequently entirely consumed by fire. Mrs. Dixon says the furnace got hot the night of the fire, the house was overheated, and the temperature was pretty hot, and when she looked at the furnace, the flames were licking up against the door and the door was sooted.

We believe those circumstances appearing in the evidence are facts from which the jury might reasonably have inferred that a reasonable person in the exercise of ordinary care would think the furnace was safe when the thermostat was set back to 55°, so, under the circumstances, we must conclude there is evidence to justify a jury as the trier of the facts in determining that the plaintiffs were exercising ordinary care. The obligation of exercising reasonable care is a duty constantly attending every individual, but whether it requires the doing of certain specific acts or things in a given situation depends upon the circumstances: LASKO v. MEIER et al., supra. When successive verdicts in the same case on substantially the same evidence are in favor of the same party, Courts of review ordinarily are reluctant to disturb the later verdict as being contrary to the weight of the evidence, if there is any competent evidence to sustain it: GOLDSTEIN v. METROPOLITAN LIFE INS. CO. (1944) 324 Ill. App. 168, (Fourth Dist.); SILBERMAN v. WASHINGTON NAT. INS. CO. (1946) 329 Ill. App. 448, (Fourth Dist.); GREER v. SHELL PET. CORP. (1935) 281 Ill. App. 238, (Fourth Dist.);



DOERR v. CITY OF FREEPORT (1926) 239 Ill. App. 560, (Second Dist.);

JENISEK v. RIGGS, supra.

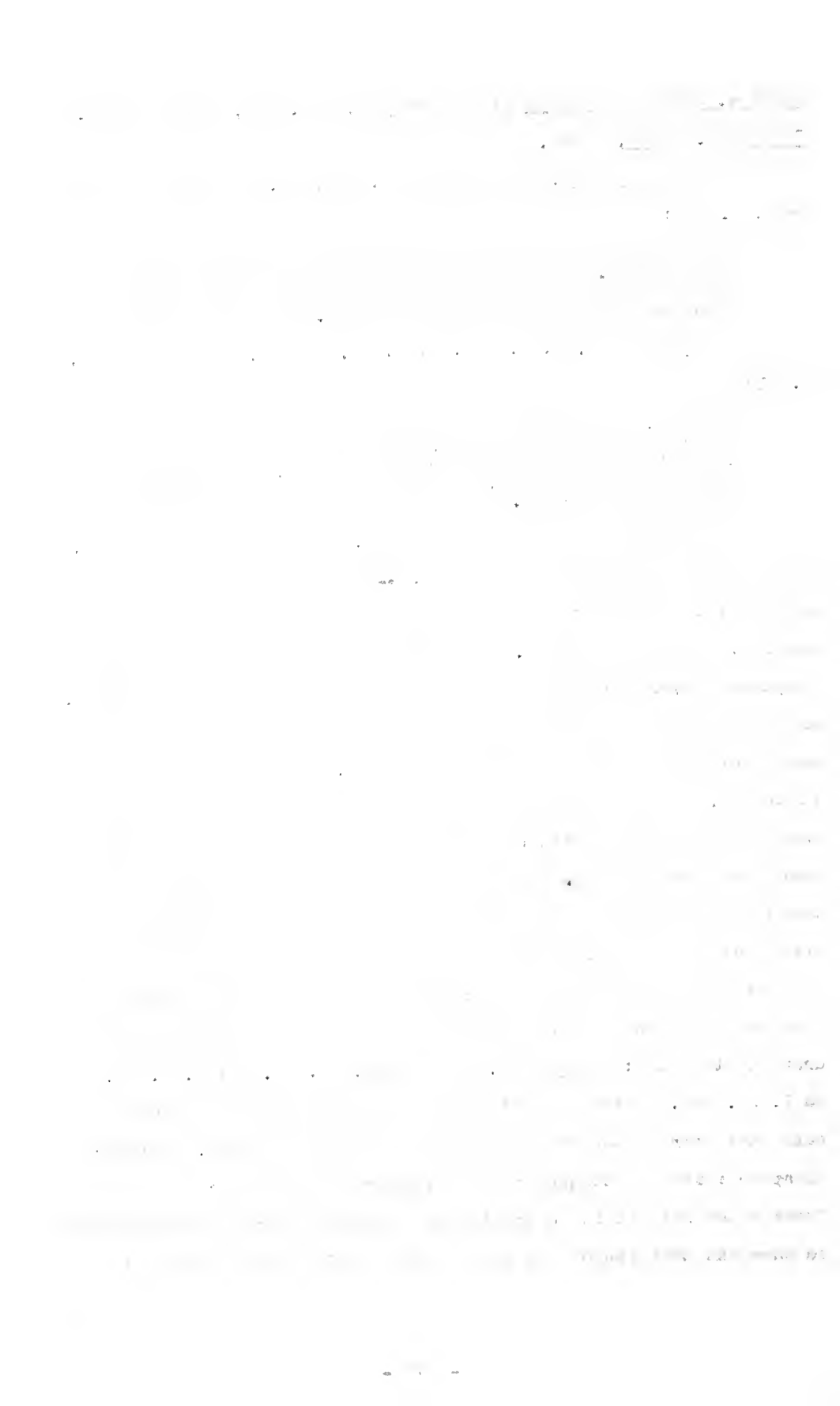
In SILBERMAN v. WASHINGTON NAT. INS. CO., supra, the Court said, p. 452:

"In this case two juries have found the issues for the same party. We have clearly stated that a consistent second verdict should not be disturbed as being against the manifest weight of the evidence."

In BONNIER v. C. B. & Q. R. R. CO., supra, the Court said, p. 614:

"Not one, but two juries have decided this question in favor of the plaintiff and, having determined that there is satisfactory evidence upon which the jurors could base their conclusion, we may not now substitute our judgment for theirs."

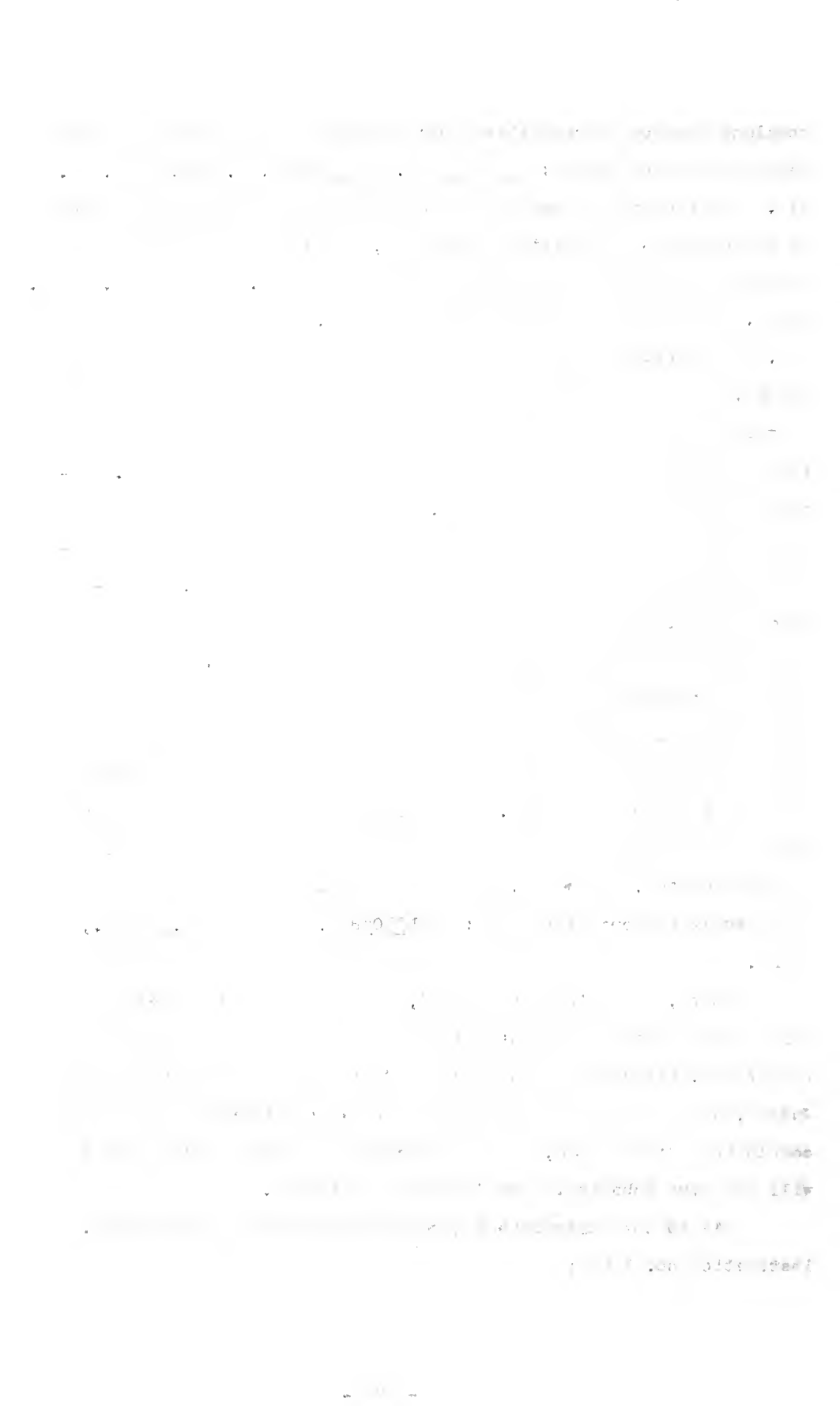
This second verdict and judgment, under the circumstances, in the present position of the case, <sup>is</sup> ~~are~~ not against the manifest weight of the evidence and hence there is no error in the denial of the motion for a new trial. The determination of the weight and preponderance of the evidence and the credibility of the witnesses, and the drawing of legitimately possible and reasonable inferences and conclusions from the facts in evidence, fundamentally are jury functions, with which we will not interfere unless the verdict is against the manifest weight of the evidence or the inferences so drawn are unreasonable. It has been said that the very essence of the jury's function is to select from among possibly conflicting inferences and conclusions that which it considers most reasonable, and that in this respect the focal point of our judicial review is the reasonableness of the particular inference or conclusion so drawn by the jury: TENNANT v. PEORIA etc. RY. CO. 321 U. S. 29, 88 L. Ed. 520. Wherever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is necessarily required on the part of those whose duty it is to settle the dispute by choosing what seems to them the most reasonable inference and only where there is a



complete absence of probative facts to support the conclusion does reversible error appear: LAVENDER v. KURN 327 U. S. 645, 90 L. Ed. 916. Our inquiry is whether the result reached below was one which is reasonable on the facts in evidence, not whether some other conclusion might also have been reached: LINDROTH v. WALGREEN CO. et al., supra. The jury and the trial court having, as they do and we do not, an opportunity to observe the conduct and demeanor of the witnesses, in addition to their actual testimony, it is primarily their function and responsibility to determine where the preponderance of the evidence lies and to draw reasonable inferences therefrom. Insofar as this matter is concerned, we cannot and do not determine as an original matter where the weight or preponderance of the evidence lies or what inferences should be drawn therefrom, but determine simply whether the verdict and judgment and inferences so drawn are against the manifest weight of the evidence, regardless of how we ourselves might have determined the weight of the evidence as an original matter or what inferences we might have drawn as an original matter had we been in the position of the jury or trial Judge in the first instance. A verdict may not be set aside merely because the jury could have drawn different inferences or merely because we feel, if we did, that other conclusions than the one drawn would be more reasonable: LINDROTH v. WALGREEN CO. et al., supra.

Here, all things considered, and this being the second verdict and judgment against the defendant and favorable to the plaintiffs, returned and entered by two different juries and trial Judges, and there being satisfactory evidence upon which the final conclusion can be based, we are reluctant to disturb the same and will not here substitute our judgment for theirs.

As to the instructions given on behalf of the plaintiffs, instruction no. 2 was;





"The Court Instructs The Jury that you are not bound to find out a thing has been proven from the fact alone that one or any number of witnesses have testified thereto. You should bring to the discharge of your duties as Jurors your own judgment and common sense. You should consider all the evidence, and from such consideration you should accept as proven only those things which from all the evidence you believe."

Although perhaps not as artfully or completely drawn as we might have liked, we do not consider that instruction as materially erroneous or as likely to confuse the jury, particularly in view of the last sentence thereof. Cf.: PEOPLE v. MATTER (1939) 371 Ill. 333, 339; KANKAKEE PARK DIST. v. HEIDENREICH (1927) 328 Ill. 198, 205. We do not consider the instruction as inviting the jury to disregard the evidence, as the defendant urges it does.

Instruction no. 5 was:

"THE COURT INSTRUCTS THE JURY that, if you find for the plaintiffs in this case, you will be required to determine the amount of their damages, if any.

"In determining the amount of damage to real estate, the correct measure of damage is the difference between the fair value of the real estate immediately before and immediately after the fire.

"In determining the amount of damages for the destruction of personal property at the time of the loss in question, you should take into consideration the value of the articles destroyed, how long said articles were in the possession of the plaintiffs, the wear and tear that would ordinarily come to said personal property, and all the facts and circumstances in evidence pertaining to them.

"And you may find under the evidence and instructions of the court for the plaintiffs and against the defendant, such sum as in your judgment, under the evidence and instructions of the court, will be fair and reasonable compensation for the damages sustained, if any, insofar as such damages are claimed and alleged in the complaint and proved by a preponderance of the evidence."

On the first appeal herein, the building and personal property having been totally destroyed, we held this same instruction was proper, and we adhere to that view. See also: CLARK v. PUBLIC SERVICE CO. (1934) 278 Ill. App. 426, (Second Dist.); JOHNSON v. PAGEL CLIKEMAN CO., INC., (1951) 343 Ill. App. 346, (Second Dist.). There was sufficient evidence in the record upon which to base the same.



Instruction no. 7 was:

"The Court Instructs the Jury that in their complaint the plaintiffs have alleged that they have been damaged by the loss by fire of their house located on Lot 41 of Blackhawk Springs Subdivision in the Township of Little Rock, Kendall County, Illinois, and by the loss by fire of their personal property located therein."

That was evidently simply a short, introductory, innocuous instruction, perhaps not necessary, but not inaccurate or confusing or harmful or prejudicial. It does not, as defendant argues, virtually say that all the plaintiffs had to prove was that they were damaged by fire in the loss of their house and personal property, - it does not refer to proof at all. If, considering the whole series of instructions given, there was not a sufficient definition of the issues as made by the pleadings, the defendant was at liberty to submit any proper instruction of that character which it desired. Evidently the defendant was satisfied in that respect at the time of the trial with such instructions as were given, or did not care to avail itself of that opportunity. As a matter of fact, defendant's own given instruction no. 1, reasonably well, though briefly, defines the issues.

The judgment, accordingly, will be affirmed.

A F F I R M E D.

*Howe, P. J. Concurs.*  
Eovaldi, J. Concurs.

"The Court instructed the jury that if their complaint against the defendant was based upon the fact that they had been damaged by the loss of a share of stock owned or controlled by the defendant, they were to find in favor of the plaintiff. The Court also instructed the jury that if their complaint was based upon the fact that the defendant had been damaged by the loss of a share of stock owned or controlled by the plaintiff, they were to find in favor of the defendant."

4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 8

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44270

8 I.A. 505

FLORENCE J. VICTOR, Administratrix  
of the Estate of Harry Philip Victor,  
Deceased,

Appellee,

v.

WILLIAM L. DEHMLow, Administrator  
of the Estate of William A. Dehmlow,  
Deceased, and WILLIAM L. DEHMLow,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

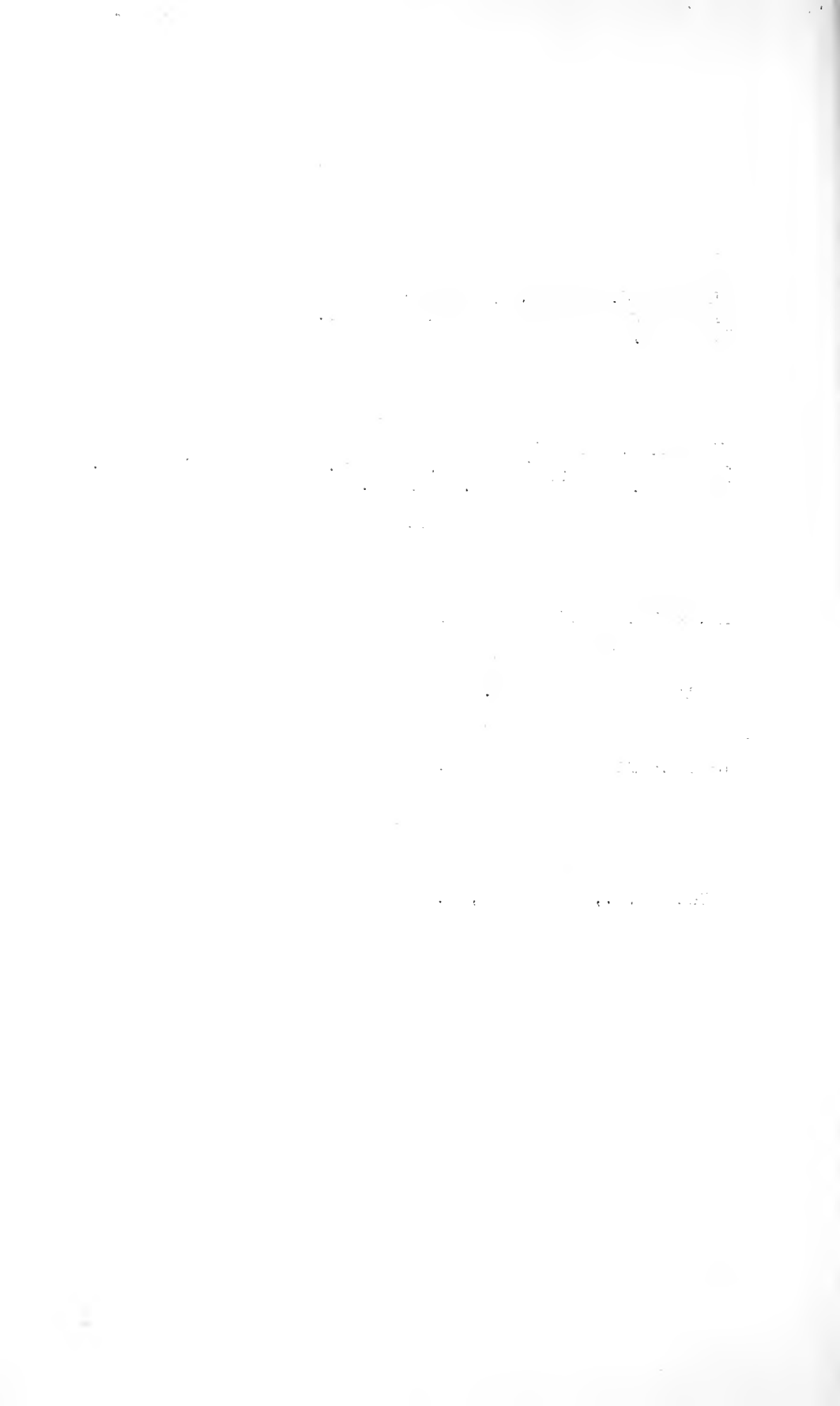
ON REHEARING.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

In this case a rehearing was granted on the  
petition of plaintiff. Having considered the petition  
and the answer thereto, we have decided to adhere to our  
opinion filed November 29, 1950.

ON REHEARING REVERSED AND  
REMANDED FOR NEW TRIAL.

BURKE, P.J., AND KILEY, J., CONCUR.



added down  
Nov. 29, 1950

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44270

8 I.A.<sup>2d</sup> 565

FLORENCE J. VICTOR, Administratrix  
of the Estate of HARRY PHILIP  
VICTOR, Deceased,

Appellee,

v.

WILLIAM L. DEHMLow, Administrator  
of the Estate of WILLIAM A. DEHMLow,  
Deceased, and WILLIAM L. DEHMLow,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment against defendants for nine thousand dollars in an action for the alleged wrongful death of plaintiff's intestate as a result of injuries sustained by the deceased when he was struck by a truck driven by defendant William L. Dehmlow. In response to a special interrogatory the jury found that the death of the deceased did not arise out of and in the course of his employment. Defendants' motion for a judgment notwithstanding the verdict and their alternative motion for a new trial were overruled. This court reversed the judgment of the trial court on the ground that the undisputed evidence disclosed that the injuries received by plaintiff's intestate which resulted in his death arose out of and in the course of his employment within the meaning of the Workmen's Compensation Act.

On appeal to the Supreme Court the judgment of this court was reversed and the cause remanded with directions to consider the other errors assigned in this court.

(Victor v. Dehmlow, 405 Ill. 249.)

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There were only two occurrence witnesses. They gave diametrically opposite versions of the accident. John Rogacs called by plaintiff testified that the point of impact was within the north crosswalk of Berteau Avenue about a foot east of the northbound rail of the street car tracks in Western Avenue. Defendants' witness Baumler testified that plaintiff's intestate was struck some distance north of the crosswalk as he stepped out from between two parked cars into the path of the defendants' truck. We think this case is close on the facts with respect to liability. Since this cause will have to be retried, we consider it necessary to comment on the other questions presented.

Defendants maintain that the trial court erred in refusing to give their instruction number 5. Criticism is also leveled at plaintiff's given instructions numbers 9, 27 and 28. The refused instruction reads:

"You are instructed that if you find from a preponderance of the evidence that the deceased was a salesman whose duties required him to travel about the city of Chicago to visit customers of his employer and solicit sales of phonograph records for his employer; and if you so find further that he was permitted by his employer to return from visits to the customers to his home without being required first to report at the place of business of his employer; and if you so find further that on the day of the occurrence complained of the deceased did travel about said city in the work of soliciting sales from his employer's customers; and if you so find further that at the time of the accident in question deceased was on his way from the place of business of one such customer to the place of business of another customer, or that he was on his way from the place of business of one such customer to his home, then you will find that the death of the deceased arose out of and in the course of his employment." (Italics ours.)



In order to understand the significance of this instruction it is necessary to recite some of the facts. There was evidence tending to prove that Harry Victor sold phonograph records; that he selected his own means of transportation; that he had no fixed working hours; that his work day started and ended at his own discretion; that he determined the customers upon whom to call; and that he communicated with his office once a week. In his opening argument plaintiff's counsel stated, "and as counsel wants you to believe that when a man is going home he is in the course of his employer's business. When you walk off the job you are in the course of your job on your way home." We think that the jury could reasonably infer from the evidence that Harry Victor was on his way home at the time he was injured and if they so believed, as plaintiff's counsel argued, then under the circumstances shown he was injured in the course of his employment. (Irwin-Neisler & Co. v. Indus. Com., 346 Ill. 89; Solar-Sturges Manf. Co. v. Indus. Com., 315 Ill. 352.) This factual situation was not covered by any other given instruction and we think the court erred in its refusal to give it.

With respect to plaintiff's instruction number 9 dealing with turning of a vehicle from a direct course in the language of the statute, the record discloses that on the hearing for a new trial plaintiff secured an order giving leave to amend the complaint by charging defendants with violating this statute. There was evidence tending to prove this charge, and the instruction therefore was not objectionable.



Plaintiff's given instruction number 27 reads:

"The burden of proof on the charge of the defendants that the Workmen's Compensation Act is a defense is upon the defendants." The recent cases of Mueller v. Elm Park Hotel Co., 391 Ill. 391, and McManaman v. Johns-Manville Corp., 400 Ill. 423, hold that the instruction is proper. We find no merit in defendants' objections to plaintiff's given instruction number 28.

Defendants say that they were prejudiced by the conduct of plaintiff's counsel during the course of the trial by making it appear to the jury that William L. Dehmlow was not willing to take the witness stand in his own defense and that he made statements to the police tantamount to a confession of liability. The evidence shows that William L. Dehmlow was served with a subpoena by counsel for plaintiff. After defendants had rested their case plaintiff's counsel called Dehmlow under section 60 of the Civil Practice Act after waiving the provisions of section 2 of chapter 51 of the Evidence Act which prohibited him from testifying, and proceeded to ask questions relative to a signed statement which he gave to the police. The trial court ruled that the statement was not admissible and thereupon plaintiff's counsel made an offer of proof that the witness had a conversation with two city patrolmen in which he stated that plaintiff's intestate was struck at the crosswalk and that the witness did not know where the deceased "came from." Since the statement bore Dehmlow's admittedly genuine signature and contained admissions



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material to the cause it was competent. (Plotkin v. Winkler, 323 Ill. App. 181). In our opinion the fact that it might have been offered in chief did not under the circumstances preclude its admission in rebuttal. (People v. Bell, 328 Ill. 446.) Reference by plaintiff's counsel in his argument to the contents of the statement given by Dehmlow to the police, which was not in evidence, and the status of this witness when he was called under section 60 we think all tended to confuse the jury, especially as the case is close on the facts.

For the reasons stated, the judgment is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED  
FOR NEW TRIAL.

BURKE, P.J. AND KILEY, J. CONCUR.

44270 - Duplicate Copy - removed  
all



45011

RETAILER'S FINANCE COMPANY,  
INC., a corporation,  
Appellant,

v.

MARGUERITE CONRY and ADKINS  
TRANSFER COMPANY, a corporation,  
Appellees.

8 I.A. <sup>2d</sup> 566  
APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

OPINION ON PETITION FOR REHEARING

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant's petition for a rehearing having been allowed, we have carefully examined same and the answer thereto and reexamined the briefs and opinion filed in this cause. After fully and fairly considering same, we are unable to reach a conclusion other than that stated in said opinion.

For the reasons stated herein the order of the Municipal Court of Chicago vacating the conditional and final judgments and releasing and discharging the garnishee is reversed and the cause is remanded with directions to enter judgment in favor of plaintiff and against Adkins Transfer Company, a corporation.

REVERSED AND REMANDED WITH  
DIRECTIONS.

KILEY, P. J. Concurs.  
FEINBERG, J., Took no part.



45222

THE PEOPLE OF THE STATE OF  
ILLINOIS,

Defendant in Error,

v.

LOUIE COSPER,

Plaintiff in Error.

1 8 I.A.<sup>2d</sup> 567  
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) ERROR FROM MUNICIPAL  
) COURT OF CHICAGO.  
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ON REHEARING.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE  
COURT.

In this case a rehearing was granted on the petition of plaintiff in error.

Plaintiff in error, Louie Cosper, hereinafter called defendant, was charged with contributing to the delinquency of female children in two separate informations. In a trial before the court without a jury he was found guilty in each case and sentenced to serve one year in the House of Correction, with sentences to run concurrently. Defendant appealed to the Supreme Court, where the cause was transferred to this court on the ground that no constitutional question was presented. (The People v. Cosper, 405 Ill. 543.) An order was entered by agreement consolidating the records in cases numbered 48 MC 72144 and 48 MC 72142.

In the case of Yvonne Kafesjian, aged ten, No. 48 MC 72144, the information alleged that defendant "did feel and put his hands on the body of said Yvonne Kafesjian (10 years)."



In People v. Weber, 335 Ill. App. 215, where the same charges were made as here and identical allegations appeared in the complaint, we held that the information was fatally defective, for the reason that it did not allege on what part of the body defendant "put his hands," and thus failed to charge defendant with the commission of any act which would directly render the prosecuting witness delinquent. Under the authority of that decision, the judgment of the Municipal Court of Chicago in case number 48 MC 72144 is reversed.

In case number 48 MC 72142, Joanne Maier, aged ten, testified in substance that on the morning of September 1, 1948, she went to the home of defendant and found him dressed in shorts and undershirt; that he placed his arm around her and kissed her; that he took her hand and asked, "Do you want to see something?" and that he exposed certain parts of his body.

Raymond Gillette, a police officer, who arrested defendant on September 10, 1948, testified that defendant after being questioned admitted being dressed in his underwear when Joanne appeared at his home on the morning in question, and that he admitted her into his house, but denied the charge in the information. Testifying in his own behalf, defendant denied seeing Joanne on the morning of September 1, and asserted that he left for his place of employment about twenty minutes before the time Joanne testified she had arrived at his home.



The record shows that at the close of the evidence in the first case, involving Yvonne Kafesjian, defendant's counsel contended that the State failed to make out a case, and asked that the defendant be discharged. Thereupon the trial judge announced that "The court will reserve ruling until we hear from the other witnesses, the other complaining witness," and then proceeded to hear the testimony in the case of Joanne Maier.

At the close of the evidence in the case of Joanne Maier defendant's counsel made a motion to discharge the defendant in both cases. So far as the record shows, defendant did not object to proceeding with the hearing in the case involving Joanne Maier until the court announced its decision in the both cases. The offenses charged are separate and distinct. The testimony in the Kafesjian case was irrelevant and inadmissible in the Maier case (see People v. Reed, 287 Ill. 606), and we think its admission irregular and prejudicial to the defendant. Defendant says that the request of the trial judge to hear the witnesses in the Maier case before ruling on the Kafesjian case shows that he entertained a reasonable doubt as to the guilt of the defendant. We are not unmindful of the presumption that the trial judge considered only the competent relevant evidence in each case before making his findings, but it would seem that if the evidence was sufficient to satisfy the trial judge of the defendant's guilt in the first case he would have made a ruling at





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the close of the proofs in that case.

Under the circumstances, in the interest of justice, we are impelled to reverse the judgment in the case of Joanne Maier, number 48 MC 72142, and remand the case for a new trial.

For the reasons given, the judgment of the Municipal Court of Chicago in case number 48 MC 72144 is reversed, and the judgment in case number 48 MC 72142 is reversed and the cause is remanded for a new trial.

ONE CASE REVERSED AND ONE  
CASE REVERSED AND REMANDED  
FOR NEW TRIAL.

Kiley, P. J., concurs.

Feinberg, J., took no part.



45222

THE PEOPLE OF THE STATE OF ILLINOIS, )  
Defendant in Error, )  
v. )  
LOUIE COSPER, )  
Plaintiff in Error. )

ERROR FROM  
MUNICIPAL COURT  
OF CHICAGO.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, Louie Gosper, hereinafter called defendant, was charged with contributing to the delinquency of female children in two separate informations. In a trial before the court without a jury he was found guilty in each case and sentenced to serve one year in the House of Correction, with sentences to run concurrently. Defendant appealed to the Supreme Court, where the cause was transferred to this court on the ground that no constitutional question was presented. (The People v. Gosper, 405 Ill. 543.) An order was entered by agreement consolidating the records in cases numbered 48 MC 72144 and 48 MC 72142.

In the case 48 MC 72144 Yvonne Kafesjian, aged ten, testified that on the morning of September 2, 1948 she went to the home of defendant to play with his dog; that when she arrived there defendant was in the kitchen dressed in an undershirt and shorts; that at defendant's invitation she entered the kitchen; and that shortly thereafter he hugged and kissed her and then committed the act charged in the information.

Raymond Gillette, a police officer, testified that he arrested defendant on September 10, 1948. At the time of the arrest defendant neither admitted nor denied the charge



but told the officer that he "wanted to see an attorney."

Defendant testified that on September 2nd, Yvonne came to his home and remained there about three minutes. He admitted being clad in his underwear but denied touching Yvonne "on any part of the body" or "exposing his body" to her. Defendant further testified that for many years he had been employed by a large corporation and was active in church work. No character witnesses were called to testify on his behalf.

In case 48 MC 72142 Joanne Maier, aged ten, testified that on the morning of September 1, 1948 she went to the home of defendant and found him dressed in shorts and undershirt; that he placed his arm around her and kissed her; that he took her hand and asked, "Do you want to see something?" and that he exposed certain parts of his body.

Officer Gillette testified that defendant after being questioned admitted being dressed in his underwear when Joanne appeared at his home, and that he admitted her into his house, but denied the charge in the information.

Defendant testifying in his own behalf denied seeing Joanne on the morning of September 1st, and stated that he had left for his place of employment about twenty minutes before the time Joanne testified that she arrived at his home.

Defendant's contention is that a conviction for contributing to the delinquency of a child, resting upon the uncorroborated testimony of a child, cannot stand where defendant denies the charge. In the case of Yvonne Kafesjian



defendant admitted substantially all of the facts as related by her except the commission of the act charged in the information. As to Joanne Maier defendant denied being present at his home when she said the offense charged was committed, but Officer Gillette testified that defendant admitted in his presence when questioned at the Sex Bureau that he was present and dressed in his underwear as described by Joanne. Defendant did not attempt to refute the testimony of Officer Gillette. Lengthy and skillful cross examination of both girls by defendant's counsel failed to disclose any substantial discrepancy in their testimony given on direct examination.

In support of his position defendant relies on The People v. Pazell, 399 Ill. 462. We are not unmindful of the danger in these cases where the conviction rests upon the testimony of young children. In the present cases the testimony of each girl is clear and convincing. Their testimony supported by the admissions of defendant, his conduct after the arrest, and the testimony of Officer Gillette we think are sufficient to sustain the convictions.

Defendant challenges the mode of the arrest. The record shows that when the informations were presented and filed defendant was present in open court and through his counsel moved for a continuance and posted bail. At that time no motion was made by defendant questioning the validity of the arrest. In The People v. Klein, 292 Ill. 420, where under similar circumstances the same contention was made as here, the court held that by making a motion for a continuance defendant waived any right he had to be discharged for want of a warrant.





Both informations are in the language of the statute and describe the specific acts charged. In the case of Joanne Maier the information was amended by inserting her correct surname. This was done at the trial after defendant had been sworn and the plea of not guilty entered. Thereupon defendant made a motion to strike the information on the ground that he was injured by being placed "in jeopardy." He did not say that he was taken by surprise, nor can we see that he was injured by the amendment, since the offense charged remained the same. This court has repeatedly held that an information may be amended. See People v. Klemick, 311 Ill. App. 508, and People v. Wancoski, 209 Ill. App. 47.

Defendant insists that the informants did not have personal knowledge of the facts stated in the informations and consequently the informations should have been dismissed for want of proper verification and want of probable cause. The informations were signed by the mothers of each of the children here involved. In People v. Boyden, 385 Ill. 521, where the same contentions were made as here, the court held that knowledge derived from others which satisfied the informants of the existence of the facts was not ground for claiming a violation of defendant's constitutional rights.

Finally defendant urges that he was prejudiced by the trial court's action in reserving its judgment in the case first tried until the court heard all the evidence in the second trial. The record shows that at the close of the evidence in the first case, involving Yvonne Kafesjian,



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defendant's counsel stated that the State had failed to make out a case and defendant should be discharged. Thereupon the trial court announced that it "will reserve ruling until we hear from other witnesses." At the close of the testimony in the case of Joanne Maier defendant's counsel made a motion to discharge the defendant "on the two respective counts." The court inquired, "Nothing further, gentlemen-- both sides rest?" Counsel for defendant replied, "Rest, your Honor." Thereupon the court made a finding of guilty and imposed the sentences in each case. No decision was requested by defendant after the proofs were closed in the first case. Nor did defendant object to proceeding with the hearing in the second case until the the court announced its decision in the first case. In our view these objections were waived by defendant's failure to raise them at the trial.

For the reasons assigned, the judgment of the Municipal Court in each case is affirmed.

JUDGMENTS AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.



46274

PEOPLE OF THE STATE OF ILLINOIS, )  
Defendant in Error, )  
v. )  
LOUIE COSPER, )  
Plaintiff in Error. )

ERROR TO THE  
MUNICIPAL COURT  
OF CHICAGO,  
FIRST DISTRICT.

8 I.A. <sup>2d</sup> 567

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is the second appeal of this cause. Plaintiff in error Louie Cosper, hereinafter called the defendant, was charged with contributing to the delinquency of two girls, Yvonne Kafesjian and Joanne Maier, each aged ten years, in two separate informations. In a trial before the court without a jury defendant was found guilty on each charge. Defendant appealed to the Supreme Court, where the cause was transferred to this court on the ground that no constitutional question was presented. (People v. Cosper, 405 Ill. 543.) This court reversed the Kafesjian case for the reason that the information was defective and in the Maier case we reversed the judgment and remanded the cause for a new trial. (General number 45222; 99 N. E. 2d 837.) Retrial of the case involving Joanne Maier resulted in the jury's finding the defendant guilty and fixing his punishment at imprisonment in the House of Correction for a term of ninety days. The cause comes here again on writ of error prosecuted by defendant.

Joanne Maier testified that at about 7:00 a.m. on September 1, 1948 she came to the defendant's house for the

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purpose of playing with his dog. At that time he was dressed in his underwear and his private parts were exposed. Soon after, he placed his arm on Joanne's shoulder, kissed her, and placed her hand on his private parts. Then he asked her to remain while he ate breakfast. During this period defendant was seated at the kitchen table, still indecently exposed. Shortly before Joanne left the defendant's premises he told her not to tell anyone what had occurred.

Joanne's mother, Ann Maier, testified that defendant admitted in her presence before the State's Attorney that he had been visited by Joanne on the morning of September 1; that he was dressed in his underwear; and that he had kissed Joanne. At the trial defendant denied that he saw Joanne on the morning of September 1 and the commission of the indecent acts. A number of character witnesses testified in behalf of defendant.

Defendant challenges the validity of the judgment on constitutional grounds. Our Supreme Court has repeatedly held that all cases in which constitutional questions are raised must be taken directly to the Supreme Court for review. If such a case is taken to the Appellate Court and other errors are assigned of which that court has jurisdiction, the defendant is held to have waived the constitutional question. (People v. Rosenthal, 370 Ill. 244; People v. Terrill, 362 Ill. 61.)

Defendant insists that notwithstanding the rule announced in the cases last cited the members of this court, by virtue of their oaths of office to support the Federal





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Constitution, particularly Article VI, are bound to consider the questions raised. In support of this position defendant relies on language appearing in Abelman v. Booth, 21 How. 506, 524, and People v. Brand, 415 Ill. 329. We find nothing in these cases to support defendant's position.

Defendant contends that the information is void because it fails to show specific violation of the statute. We think that the allegation in the information charging defendant with exposing his private parts in the presence of Joanne sufficiently apprised the defendant.

Defendant also complains of People's given instructions 1, 2 and 3. We have examined these instructions and in our view they state substantially the law governing this cause.

Joanne Maier detailed the acts committed by the defendant, at both trials, with the same results. She was subjected to prolonged cross-examination. Her testimony was positive and convincing. Even though she was contradicted by the defendant we think the evidence warranted the finding of the jury. See People v. Wilson, 1 Ill. 2d, 178.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

FEINBERG, P.J. AND KILEY, J., CONCUR.











*This Book  
Does Not  
CIRCULATE*

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